Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–19 OF 2005(W)
ABDUL HAMID MOHAMAD, AUGUSTINE PAUL AND ABDUL AZIZ MOHAMAD FCJJ
27 AUGUST 2007

Civil Procedure — Estoppel — Res judicata — Effect of earlier decision of Supreme Court in judicial review proceedings — Whether plaintiff precluded from raising issue in subsequent civil proceedings

Civil Procedure — Estoppel — Res judicata — Effect of earlier decision of tribunal — — Whether LAM empowered to determine disputes between architect and client — Whether plaintiff precluded from raising issue in subsequent civil proceedings

Contract — Breach — Performance of contract — Whether defendant could disable itself from performance — Whether defendant committed a constructive breach of contract

Contract — Termination — Right to terminate — Whether agreement contained implied right to terminate — Whether defendant could terminate contract with plaintiff upon reasonable notice being given

The defendant (respondent to the appeal) was the registered proprietor and beneficial owner of certain pieces of land. The plaintiff (appellant to the appeal) was appointed to prepare a comprehensive development plan for a township encompassing the lands and surrounding lands belonging to the State. By a letter dated 1 November 1998 the defendant purported to discharge the plaintiff as the architect for the project as the defendant intended to utilize the services of the architect of its new majority shareholder. The plaintiff maintained that its discharge was bad in law and of no effect. The matter was referred to Lembaga Akitek Malaysia ('LAM'). LAM made a decision that the defendant had the right to terminate the services of the plaintiff with or without assigning any reason. The plaintiff commenced certiorari proceedings against LAM in the High Court. The High Court quashed the LAM decision. But, on appeal, the Supreme Court set aside the High Court order. Thereafter, the plaintiff commenced proceedings in the High Court against the defendant for professional fees and disbursements under the contract. The High Court gave judgment in favour of the plaintiff. The defendant appealed to the Court of Appeal. The appeal centred on two issues: (1) whether the defendant can terminate the plaintiff's services under the contract; and (2) the quantum of damages to be awarded to the plaintiff. On the first issue, the Court of Appeal ruled that the question of termination of the services of the plaintiff was res judicata and thus

cannot be relitigated. On the second issue, the Court of Appeal set aside the award of damages made by the High Court. The plaintiff was granted leave to appeal to the Federal Court on the following questions of law: (1) Is LAM competent to decide on the lawfulness or otherwise of the termination of an architect by his client; and (2) if the answer to question (1) is in the negative, was the termination of the plaintiff by the defendant lawful.

Held, allowing the appeal:

(1) (per **Augustine Paul FCJ**) Res judicata applies only in respect of a matter over which the court has pronounced a judgment. In this case the LAM decision was upheld by the Supreme Court pursuant to a proceeding for judicial review. It is settled law that judicial review is concerned with the process of decision making and not with the decision itself. As a judicial review proceeding is concerned with the decision-making process and not with the decision itself the decision cannot constitute res judicata of the court upholding the decision making process (see paras 25–26 & 28).

(2) (per **Augustine Paul FCJ**) What thus requires immediate consideration is the extent to which the doctrine of res judicata can extend to a tribunal which is not a court. The test to be applied in determining whether the decision of a tribunal, which is not a court, is capable of constituting res judicata is whether it has jurisdiction, derived either from statute or from the submission of parties, to decide finally a question arising between the parties before it. A final decision in this sense means that it leaves nothing to be judicially determined or ascertained thereafter in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review or modification by the tribunal which pronounced it. The LAM decision will therefore constitute res judicata as a decision of LAM only if it had jurisdiction to render a final decision on the dispute (see paras 30–32);.*Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90; *Kandiah Peter a/l Peter v Public Bank Bhd* [1994] 1 MLJ 119 followed.

(3) (per **Augustine Paul FCJ**) It is clear that LAM is only empowered to hear and determine disputes relating to professional conduct. The section gives no power to LAM to hear disputes between an architect and his client. It follows that LAM had no jurisdiction to entertain the dispute between the parties. Where a tribunal makes a decision which is outside its jurisdiction it is null and void. The LAM decision is thus in that position and is of no effect (see paras 36–37); *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657 followed.

(4) (per **Augustine Paul FCJ**) In any event the LAM decision is not final in the sense that it is not complete as no decision was made on the claim for fees thereby making it incapable of operating as res judicata. It can at best be described as a decision relating to the letter of release which may well be a matter of professional conduct. The LAM decision cannot constitute a res judicata between the parties even as a decision of LAM. The LAM is not competent to decide on the lawfulness or otherwise of the termination of an architect by his client (see paras 37–38).

(5) (per **Augustine Paul FCJ**) The lawfulness or otherwise of the termination of the services of the plaintiff by the defendant would, in the first place, depend on whether the agreement between them contains a right to terminate. The agreement between the parties does not prescribe any express right of termination. The question of whether such a term can be implied would depend upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances. It must be presumed that the plaintiff had knowledge of the Conditions of Engagement in the Fourth Schedule. He is bound to adopt them. The defendant was under the impression that it was entitled to terminate the agreement at any time. This, in substance, is the right contained in r 7. A right to terminate the agreement on any ground is therefore the obvious, but unexpressed, intention of the parties thereby making it into an implied term. The Conditions of Engagement in the Fourth Schedule also constitute implied terms in order to give business efficacy to the agreement by virtue of being a custom or practice of the architectural profession. It follows that the agreement between the plaintiff and the defendant may be terminated at any time by either party upon reasonable notice being given (see paras 41–42, 48–49).

(6) (per **Augustine Paul FCJ**) The reason given by the defendant for the termination of the services of the plaintiff is subject to review by the court. The fact that IGB wished to utilise the services of its own architect does not indicate any fault on the part of the plaintiff. The termination was due solely for the reason that the new majority shareholders of the defendant wanted to use the services of their own architect with a new development plan. It was a reason brought about by the act of the defendant itself. The result is that the services of the plaintiff was terminated for reasons brought about by the acts of the defendant itself. In other words the defendant had disabled itself from performing the contract (see paras 52–53).

(7) (per **Augustine Paul FCJ**) The defendant cannot disable itself from performing a contract brought about by its own acts. The reason for the termination of the services of the plaintiff by the defendant is thus not valid. There is therefore a constructive breach of contract by the defendant. Where a party by his own act makes it impossible for him to perform his contract at the due date, there is a constructive breach of contract, and the other party is entitled forthwith to enforce his rights as on a breach (see paras 56–57).

(8) (per **Abdul Aziz Mohamad FCJ** and **Abdul Hamid Mohamad FCJ**) The Practice Committee and LAM were not concerned with the question whether the termination of the plaintiff's services was a 'wrongful' one entitling the plaintiff to damages or compensation for breach of contract, that is to say, they were not concerned with the justice of the termination. They were concerned only to satisfy themselves that the defendant had in fact terminated the plaintiff's services, which to them the defendant had the 'basic right' to do. To the Practice Committee and LAM, a client has the basic right not to want to continue retaining the services of his architect and cannot be compelled to continue the relationship if it is no longer desired. A termination ends the relationship; whether or not the termination of the relationship is wrongful is a separate question. If the termination is wrongful, then damages would ensue.

That is what the Practice Committee must have meant when it said in its letter of 15 March 1989 that there was no question that the defendant had the right to terminate the plaintiff's services with or without giving any reason (see para 105).

(9) (per **Abdul Aziz Mohamad FCJ** and **Abdul Hamid Mohamad FCJ**) LAM had all along been consistent in its stand that in deciding that the defendant had the right to terminate the plaintiff's services, it was not deciding that the services were validly terminated, which to it was a separate question and one on which the question of damages depended. It took that stand in the certiorari proceedings in the High Court and it took that stand in the appeal to the Supreme Court. Even the defendant, in the certiorari action, took the stand that LAM did not decide on the validity of the termination. LAM's decision of 14 March 1989 was essentially a decision to waive the requirement for the letter of release and it was made on its previous finding that the plaintiff's services had been actually terminated (see para 133).

(10) (per **Abdul Aziz Mohamad FCJ** and **Abdul Hamid Mohamad FCJ**) Even if the Supreme Court also decided that LAM had jurisdiction to decide that the defendant had the right to terminate the plaintiff's services, which the Court of Appeal said the Supreme Court did, the Supreme Court ought not in the present appeal to be taken to have meant the defendant's right to be in a higher sense than what LAM, the successful party, and even the defendant itself, contended, which was merely a right to effect an actual termination. In deciding as it did, the Court of Appeal had overlooked the sense in which LAM must have spoken of 'right to terminate' and LAM's insistence that it did not decide that the plaintiff's services had been validly terminated. The Supreme Court cannot be taken to have decided that LAM's decision was that the plaintiff's services had been validly terminated and that LAM had jurisdiction to make such a decision. That was the basis on which the court found that the Supreme Court's decision in the certiorari action does not constitute res judicata, as being a decision that LAM did make such a decision and had jurisdiction to make it (see para 134).

(11) (per **Abdul Aziz Mohamad FCJ** and **Abdul Hamid Mohamad FCJ**) By the manner of its wording, r 28 of the Architects (Scale of Minimum Fees) Rules 1986 imposes a duty on an architect to enter into an engagement only upon the conditions in the Conditions of Engagement. If he fails to do so and enters into an engagement otherwise than upon the conditions in the Conditions of Engagement, he acts in breach of the rule and is liable to suffer the consequences of breaching the rule, but the engagement remains an engagement that is not in accordance with the conditions in the Conditions of Engagement. The Conditions of Engagement, therefore, will apply to an engagement of an architect only through observance by the architect of r 28 by incorporating them in the contract. If the architect does not observe r 28, the Conditions of Engagement are not incorporated into the contract. Rule 28 is not worded as a provision that makes the Conditions of Engagement directly applicable to every engagement of an architect (see para 143).

(12) (per **Abdul Aziz Mohamad FCJ** and **Abdul Hamid Mohamad FCJ**) LAM is a creature of statute, the Architects Act 1967. What it may or may not do is

to be found only in the Act and the rules made under s 35. There is no provision that gives LAM the competency to decide the lawfulness or otherwise of the termination of the services or engagement of an architect by his client, which is a question that arises only in a dispute between the client and an architect about their contractual relationship. The disputes that LAM is empowered by para (e) of s 4 of the Act to hear and determine are disputes relating to professional conduct or ethics of architects. LAM is not competent to decide the lawfulness or otherwise of the termination of an architect by his client. Only the Act can give it that competence and the Act does not give it (see paras 148 & 151).

[**Bahasa Malaysia summary**

Defendan (responden dalam rayuan) merupakan tuanpunya berdaftar dan pemilik benefisiari beberapa bidang tanah tertentu. Plaintif (perayu dalam rayuan) telah dilantik untuk menyediakan satu pelan pembangunan yang komprehensif untuk satu perbandaran yang meliputi tanah-tanah dan tanah sekeliling milik Kerajaan Negeri. Melalui sepucuk surat bertarikh 1 November 1998 defendan dikatakan bertujuan untuk melucutkan plaintif sebagai arkitek untuk projek tersebut kerana defendan berhasrat untuk menggunakan khidmat arkitek kepada pemegang saham majoritinya yang baru. Plaintif menegaskan bahawa pelucutannya adalah salah di sisi undang-undang dan tiada kesan. Lembaga Akitek Malaysia ('LAM'). LAM telah membuat satu keputusan bahawa defendan mempunyai hak untuk menamatkan khidmat plaintif dengan atau tanpa memberikan apa-apa alasan. Plaintif telah memulakan prosiding certiorari terhadap LAM di Mahkamah Tinggi. Mahkamah Tinggi telah membatalkan keputusan LAM. Namun, selepas mengemukakan rayuan, Mahkamah Agong telah mengenepikan perintah Mahkamah Tinggi. Berikutan itu, plaintif telah memulakan prosiding di Mahkamah Tinggi terhadap defendan untuk yuran profesional dan wang pendahuluan di bawah kontrak. Mahkamah Tinggi telah memberikan penghakiman menyebelahi plaintif. Defendan telah merayu ke Mahkamah Rayuan. Rayuan tersebut berkisarkan dua isu: (1) sama ada defendan boleh menamatkan khidmat plaintif di bawah kontrak itu; dan (2) kuantum ganti rugi yang patut diawardkan kepada plaintif. Berhubung isu pertama, Mahkamah Rayuan telah memutuskan bahawa persoalan penamatan perkhidmatan plaintif adalah res judicata dan oleh itu tidak boleh dilitigasikan semula. Berhubung isu kedua, Mahkamah Rayuan telah mengenepikan award ganti rugi yang dibuat oleh Mahkamah Tinggi. Plaintif telah diberikan kebenaran untuk merayu ke Mahkamah Persekutuan berdasarkan persoalan undang-undang berikut: (1) adakah LAM kompeten untuk memutuskan tentang kesahihan atau sebaliknya penamatan arkitek oleh anak guamnya; dan (2) jika jawapan kepada persoalan (1) adalah negatif, adakah penamatan plaintif oleh defendan sah di sisi undang-undang.

Diputuskan, membenarkan rayuan tersebut:

(1) (oleh **Augustine Paul HMP**) Res judicata hanya terpakai berkaitan perkara yang mana mahkamah telah menyampaikan satu penghakiman. Dalam kes ini keputusan LAM telah dikekalkan oleh Mahkamah Agong berikutan satu prosiding untuk semakan kehakiman. Adalah undang-undang tetap bahawa

semakan kehakiman adalah berkaitan proses membuat keputusan dan bukan keputusan itu sendiri. Oleh kerana suatu prosiding semakan kehakiman adalah berkaitan dengan proses membuat keputusan dan bukan keputusan itu sendiri maka keputusan tersebut tidak membentuk res judicata mahkamah yang mengekalkan proses membuat keputusan itu (lihat perenggan 25–26 & 28).

(2) (oleh **Augustine Paul HMP**) Apa yang perlu dipertimbangkan segera adalah setakat mana doktrin res judicata boleh meliputi suatu tribunal yang bukan suatu mahkamah. Ujian yang terpakai untuk menentukan sama ada keputusan satu tribunal, yang bukan satu mahkamah, mampu membentuk res judicata adalah sama ada ia mempunyai bidang kuasa, yang wujud sama ada daripada statut atau penghujahan pihak-pihak, untuk akhirnya memutuskan suatu persoalan yang timbul antara pihak-pihak di hadapannya. Suatu keputusan muktamad dalam erti kata ini bermaksud tiada yang perlu ditentukan atau dipastikan secara kehakiman bagi tujuan menjadikannya efektif dan dapat dilaksanakan, dan adalah mutlak, lengkap, dan pasti, dan apabila ia tidak tertakluk dari segi undang-undang untuk seterusnya dibatalkan, disemak atau diubah oleh tribunal yang mengisytiharkannya. Keputusan LAM oleh itu akan membentuk res judicata sebagai keputusan LAM hanya jika ia mempunyai bidang kuasa untuk membuat keputusan muktamad yang dipertikaikan (lihat perenggan 30–32); *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90; *Kandiah Peter a/l Peter v Public Bank Bhd* [1994] 1 MLJ 119 diikut.

(3) (oleh **Augustine Paul HMP**) Adalah jelas bahawa LAM hanya diberi kuasa untuk mendengar dan menentukan pertikaian berkaitan perlakuan profesional. Seksyen tersebut tidak memberikan LAM untuk mendengar pertikaian antara arkitek dan pelanggannya. Berikutan itu LAM tiada bidang kuasa untuk mendengar pertikaian antara pihak-pihak tersebut. Di mana suatu tribunal membuat suatu keputusan yang di luar bidang kuasanya ia adalah terbatal dan tidak sah. Keputusan LAM oleh itu berada dalam kedudukan itu dan tidak berkuat kuasa (lihat perenggan 37 & 39); *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657 diikut.

(4) (oleh **Augustine Paul HMP**) Dalam apa keadaan keputusan LAM tidak muktamad dalam erti kata ia tidak lengkap kerana tiada keputusan telah dibuat tentang tuntutan yuran yang mana menjadikannya tidak dapat beroperasi sebagai res judicata. Sebaiknya ia digambarkan sebagai satu keputusan berkaitan Surat Pelepasan yang mana suatu perkara tentang perlakuan professional. Keputusan LAM tidak boleh membentuk suatu res judicata antara pihak-pihak jikapun sebagai suatu keputusan LAM. LAM tidak kompeten untuk memutuskan kesahihan atau sebaliknya penamatan akitek oleh pelanggannya (lihat perenggan 37–38).

(5) (oleh **Augustine Paul HMP**) Kesahihan atau sebaliknya penamatan khidmat plaintif oleh defendan akan, terlebih dahulu, bergantung kepada sama ada perjanjian antara mereka mengandungi hak penamatan. Perjanjian antara pihak-pihak tidak menetapkan apa-apa hak nyata tentang penamatan. Persoalan sama ada terma sedemikian boleh diandaikan tersirat bergantung kepada niat pihak-pihak seperti yang terangkum dalam perkataan-perkataan perjanjian dan keadaan sekeliling. Adalah diandaikan bahawa plaintif

A mempunyai pengetahuan tentang Syarat-Syarat Pelantikan dalam Jadual Keempat. Beliau terikat dengannya. Defendan mengandaikan bahawa ia berhak untuk menamatkan perjanjian itu pada bila-bila masa. Ini, secara substantif, adalah hak yang terkandung dalam k 7. Suatu hak untuk menamatkan perjanjian atas apa-apa alasan yang jelas, tetapi tidak dinyatakan, niat pihak-pihak yang menjadikannya suatu terma tersirat. Syarat-Syarat Pelantikan dalam Jadual Keempat juga membentuk terma-terma tersirat bagi tujuan memberikan kesan perniagaan kepada perjanjian itu menurut kebiasaan atau amalan profesion seni bina. Berikutan itu perjanjian antara plaintif dan defendan boleh ditamatkan pada bila-bila masa oleh mana-mana pihak sekiranya notis munasabah diberikan (lihat perenggan 41–42, 48–49).

C (6) (oleh **Augustine Paul HMP**) Alasan yang diberikan oleh defendan untuk penamatan khidmat plaintif adalah tertakluk kepada semakan mahkamah. Hakiakt bahawa IGB berhasrat untuk menggunakan khidmat arkiteknya sendiri tidak menunjukkan apa-apa kesalahan di pihak plaintif. Penamatan itu semata-mata disebabkan pemegang-pemegang saham baru defendan yang D ingin menggunakan khidmat arkitek mereka sendiri dengan satu pelan pembangunan baru. Ia merupakan alasan yang dikemukakan melalui tindakan defendan sendiri. Akibatnya adalah khidmat plaintif ditamatkan atas sebab-sebab akibat tindakan defendan sendiri. Dalam erti kata lain defendan telah menunjukkan ketidakmampuannya sendiri daripada melaksanakan E kontrak tersebut (lihat perenggan 52–53).

(7) (oleh **Augustine Paul HMP**) Defendan tidak boleh melepaskan diri daripada melaksanakan satu kontrak yang dimulakan oleh tindakannya sendiri. Alasan untuk penamatan khidmat plaintif oleh defendan oleh itu tidak sah. Terdapat penamatan kontrak secara konstruktif oleh defendan. Di mana suatu F pihak melalui tindakannya sendiri menjadikannya mustahil untuk melaksanakan kontraknya pada tarikh yang ditetapkan, terdapat pelanggaran kontrak yang konstruktif, dan pihak satu lagi berhak menguatkuasakan haknya berdasarkan pelanggaran itu (lihat perenggan 56–57).

(8) (oleh **Abdul Aziz Mohamad HMP** dan **Abdul Hamid Mohamad HMP**) G Jawatankuasa Amalan dan LAM tidak mengendahkan persoalan sama ada penamatan khidmat plaintif adalah 'wrongful' yang memberikan plaintif hak untuk mendapat ganti rugi atau pampas an kerana pelanggaran kontrak, di mana dikatakan, ia tidak mementingkan keadilan penamatan itu. Ia hanya mementingkan kepuasan mereka yang defendan telahpun menamatkan khidmat plaintif, yang mana kepada mereka defendan mempunyai 'basic right' H untuk berbuat demikian. Kepada Jawatankuasa Amalan dan LAM, seorang pelanggan mempunyai hak asas untuk tidak meneruskan khidmat arkiteknya dan tidak boleh memaksa hubungan itu berterusan jika ia tidak lagi diingini. Suatu penamatan mengakhirkan hubungan, sama ada atau tidak penamatan hubungan itu salah adalah persoalan berasingan. Jika penamatan itu adalah I salah maka ganti rugi wujud. Inilah yang dimaksudkan oleh Jawatankuasa Amalan dalam suratnya 15 Mac 1989 bahawa tidak boleh dipersoalkan lagi bahawa defendan mempunyai hak untuk menamatkan khidmat plaintif dengan atau tanpa memberikan apa-apa alasan (lihat perenggan 105).

(9) (oleh **Abdul Aziz Mohamad HMP** dan **Abdul Hamid Mohamad HMP**) LAM sentiasa konsisten dengan pendiriannya bahawa dalam memutuskan bahawa defendan mempunyai hak untuk menamatkan khidmat plaintif, ia tidak memutuskan bahawa khidmat itu telah ditamatkan dengan sah, yang mana ianya satu persoalan berasingan dan yang mana persoalan ganti rugi bergantung kepadanya. Ia mengambil pendirian itu dalam prosiding certiorari di Mahkamah Tinggi dan ia mengambil pendirian itu dalam rayuan ke Mahkamah Agong. Jikapun defendan, dalam tindakan certiorari, mengambil pendirian bahawa LAM tidak membuat keputusan berdasarkan kesahan penamatan, keputusan LAM bertarikh 14 Mac 1989 merupakan keputusan penting untuk mengenepikan keperluan untuk surat pelepasan dan ia dibuat dalam penemuan sebelumnya bahawa khidmat plaintif telahpun ditamatkan (lihat perenggan 133).

(10) (oleh **Abdul Aziz Mohamad HMP** dan **Abdul Hamid Mohamad HMP**) Meskipun Mahkamah Agong juga telah memutuskan bahawa LAM mempunyai bidang kuasa untuk memutuskan bahawa defendan mempunyai hak untuk menamatkan khidmat plaintif, yang mana Mahkamah Rayuan mengatakan Mahkamah Agong ada, Mahkamah Agong tidak sepatutnya dalam rayuan semasa dianggap telah memberi maksud yang hak defendan lebih tinggi daripada apa yang LAM, pihak yang berjaya, dan defendan sendiri, menegaskan, yang hanya suatu hak untuk menguatkuasakan penamatan sebenar. Dalam membuat keputusan sedemikian, Mahkamah Rayuan terlepas perhatian maksud yang dinyatakan oleh LAM tentang 'right to terminate' dan kesungguhan LAM yang mana ia tidak memutuskan bahawa khidmat plaintif telahpun ditamatkan secara sah. Mahkamah Agong tidak boleh dianggap telah membuat keputusan bahawa keputusan LAM adalah bahawa khidmat plaintif telahpun ditamatkan dengan sah dan bahawa LAM mempunyai bidang kuasa untuk membuat keputusan sedemikian. Itulah asas yang mahkamah ini dapati bahawa keputusan Mahkamah Agong dalam tindakan certiorari tidak membentuk res judicata, sebagai satu keputusan bahawa LAM sememangnya telah membuat keputusan sebegitu dan mempunyai bidang kuasa membuatnya (lihat perenggan 134).

(11) (oleh **Abdul Aziz Mohamad HMP** dan **Abdul Hamid Mohamad HMP**) Menurut susun katanya, k 28 Kaedah-Kaedah Arkitek (Skala Yuran Minimum) 1986 meletakkan satu kewajipan ke atas seorang arkitek untuk memasuki satu ikatan hanya berdasarkan syarat-syarat dalam Syarat-Syarat Pelantikan. Jika beliau gagal berbuat demikian dan memasuki satu ikatan sebaliknya tanpa menurut syarat-syarat dalam Syarat-Syarat Pelantikan, beliau bertindak melanggar kaedah itu dan bertanggungjawab untuk mengalami akibat melanggar kaedah itu, namun pelantikan itu tetap satu pelantikan yang tidak menurut syarat-syarat dalam Syarat-Syarat Pelantikan. Syarat-Syarat Pelantikan itu, oleh demikian, akan terpakai kepada pelantikan arkitek hanya melalui penelitian oleh arkitek menurut k 28 dengan memasukkannya dalam kontrak. Jika arkitek itu tidak mematuhi k 28, Syarat-Syarat Pelantikan tidak dimasukkan dalam kontrak itu. Kaedah 28 tidak dimasukkan sebagai satu peruntukan yang membuat Syarat-Syarat Pelantikan secara langsung terpakai kepada semua pelantikan arkitek (lihat perenggan 143).

(12) (oleh **Abdul Aziz Mohamad HMP** dan **Abdul Hamid Mohamad HMP**) LAM adalah perkara statut, Akta Arkitek 1967. Apa yang ia bolah dan tidak bolah laksanakan hanya termaktub dalam Akta tersebut dan kaedah-kaedah yang digubal di bawah s 35. Tiada peruntukan yang memberikan LAM kompetensi untuk memutuskan kesahan atau sebaliknya penamatan khidmat atau pelantikan arkitek oleh pelanggannya, yang merupakan satu persoalan yang timbul hanya dalam pertikaian antara pelanggan dan arkitek tentang hubungan kontraktual mereka. Pertikaian yang LAM diberi kuasa oleh perenggan (e) kepada s 4 Akta tersebut untuk mendengar dan menentukan adalah pertikaian berkaitan perlakuan profesional atau etika arkitek. LAM tidak kompeten untuk memutuskan kesahan atau sebaliknya penamatan arkitek oleh pelanggannya. Hanya Akta tersebut memberikan kekompetenan itu dan Akta tidak memberikannya (lihat perenggan 148 & 151).]

Notes

For cases on performance of contract, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2674–2680.

For cases on res judicata, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2630–2642.

For cases on right to terminate, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5197–5203.

Cases referred to

Administration of the Territory of Papua and New Guinea & Anor, The v Daera Guba (1973–1974) 130 CLR 353 (refd)

Alghussein Establishment v Eton College [1991] 1 All ER 267 (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Bank Pusat Kerjasama Bhd (in liquidation) v Mahkamah Perusahaan Malaysia & Anor [1994] 3 MLJ 537 (refd)

British & Beningtons Ltd v NW Cachar Tea Co (1923) AC 48 (refd)

CS Khin Development Sdn Bhd v Chung Yoke Onn [1985] 2 MLJ 319 (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 (folld)

Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155 (refd)

Datin Peggy Taylor v Udachin Development Sdn Bhd [1984] 1 MLJ 85 (refd)

Edwin Hill & Partners v Leakcliffe Properties Ltd & Anor (1984) 29 BLR 43 (refd)

Kandiah Peter a/l Peter v Public Bank Bhd [1994] 1 MLJ 119 (folld)

Hadley v Baxendale (1854) 9 Exch 341 (refd)

Henderson v Henderson (1843) 3 Hare 100 (refd)

Houweling Nurseries v Governor and Company of Adventures of England Trading Into Hudson's Bay (1984) 13 DLR (4th) 93 (BCCA) (refd)

Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd (1983) 1 Lloyd's Rep 551 (refd)

Lee Wah Bank Ltd v National Union of Bank Employees [1981] 1 MLJ 169 (refd)

Liverpool City Council v Irwin [1977] AC 239 (refd)

Mahamed Mozaharal Ahmad v Mahamed Azimaddin Bhuinya AIR 1923 Cal 507 (refd)

Manharlal Bhaichand Gathani v Perwira Habib Bank (M) Bhd [2002] 2 MLJ 139 (refd)

Midvalley City Sdn Bhd & Anor v Arkitek Tenggara Sdn Bhd [2005] 6 MLJ 222 (refd)

Mosvolds Rederi A/S v Food Corporation of India (1986) 2 Lloyd's Rep 68 (refd)
Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416 (refd)
Petaling Tin Bhd v Lee Kian Chan & Ors [1994] 1 MLJ 657 (folld)
R v Secretary of State for the Environment; ex parte Hackney LBC & Anoer [1983] 3 All ER 358 (refd)
Saranpet v Punno (1931) 134 IC 779 (refd)
Sidney Kaye, Eric Firmin & Partners v Leon Joseph Bronesky (1973) 4 BLR 1 (refd)
Synge v Synge (1894) 1 QB 466 (refd)
Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor [1987] 1 MLJ 124 (refd)
Thomas v Hammersmith Borough Council [1938] 3 All ER 203 (refd)
Timeload Ltd v British Telecommunications Plc (1995) EMLR 459 (refd)
Toeh Kee Keong v Tambun Mining Co Ltd [1968] 1 MLJ 39 (refd)
Udachin Development Sdn Bhd v Datin Peggy Taylor [1985] 1 MLJ 121 (refd)
Universal Cargo Carriers Corpn v Citati [1957] 2 QB 401 (refd)
Yarlagadda China Rattayya v Donepudi Venkataramayya AIR 1959 551 (refd)

Legislation referred to

Architects Act 1967 ss 4, 35
Architects (Amendment) Rules 1986 r 28
Architects Rules 1973 rr 7, 21, 28 of Fourth Schedule
Architects (Scale of Minimum Fees) Rules 1986
Contracts Act 1950 ss 40, 74
Contracts Act [India] ss 39, 73

Appeal from: Civil Appeal No W-02–384 of 1999 (Court of Appeal, Putrajaya)

Cyrus Das (Manjit Singh, Porres Rayan and CS Kumar with him) (Kumar Partnership)for the appellant.
V Sithambaran (P Navarataam and V Sivaparanjothi with him) (V Siva & Partners) for the respondent.

Abdul Hamid Mohamad FCJ:

[1] I have the advantage of reading both the judgments of my brothers Augustine Paul FCJ and Abdul Aziz Mohamad FCJ. I agree with them that the appeal be allowed with costs here and below and that the orders of the Court of Appeal be set aside and the orders of the High Court be restored. As for the reasons, I associate myself with those given by my brother Abdul Aziz Mohamad FCJ.

Augustine Paul FCJ:

[2] This appeal raises for consideration the extent to which decisions of the Lembaga Akitek Malaysia ('LAM') can operate as res judicata and the effect of a contract where one party disables himself from performing his part.

[3] The facts of the case as found by the courts below are as follows. The defendant (the respondent in this court), formerly known as Bandar Incorporated Development Sdn Bhd, was at all material times, the registered proprietor and beneficial owner of all the pieces of land held under GM 755 Lot 19, GM 776 Lots 23 and 25, GM 872 Lot 34, GM 753 Lot 21, all in Section 95A Town of Kuala Lumpur ('the lands'). In 1982 the plaintiff (the appellant in this court) was appointed by one Lim Pak Tow & Sons Realty Sdn Bhd ('Lim Pak Tow') to submit plans for the commercial development of part of the lands, that is to say, Lots 19 and 21 as the relevant authorities had intended to compulsorily acquire the said lots. By a letter dated 2 November 1982 the plaintiff submitted an application to the Jabatan Perancang for change of use of the lands and also for an increase of the population density with the accompanying layout plan for Lots 19 and 21.

[4] By a letter dated 8 November 1982 to Lim Pak Tow the Plaintiff set out the terms of his appointment as an architect for the submission of plans for the change of land use and for the increase in density of Lot 19. The terms were as follows:

(a) On submission to Planning Department for change of use and increase in density, the Plaintiff would be paid a lump sum fee of RM20,000.

(b) Should the project proceed further requiring the full professional services of the Plaintiff, the lump sum fee of RM20,000 would be deemed to be part payment towards the plaintiff's fees of 5% of the total construction costs

[5] Lim Pak Tow then engaged the plaintiff to prepare a comprehensive development plan for a township encompassing the lands and the surrounding land which belonged to the State. The development proposal was then handed over to the Datuk Bandar together with a letter on 3 November 1982. The proposal was then formally submitted to the Datuk Bandar by way of a letter dated 10 January 1983 together with photographs of the architectural model to the original proposal through Lim Pak Tow. Following this, Lim Pak Tow and PW1, a Director of the plaintiff, attended a meeting at Dewan Bandaraya on 1 April 1983. The Datuk Bandar agreed to withdraw the Government's intention of acquiring the lands provided that a company was incorporated for the purpose of developing the lands on a joint venture basis with the Datuk Bandar. The defendant is the company that was incorporated. A report prepared by the plaintiff was used by Jordan Lee Jaafar Sdn Bhd to prepare their valuation reports which the Datuk Bandar used as a basis for his acquisition of the neighbouring lots. At a meeting held at the Dewan Bandaraya on 8 August 1983 the plaintiff was requested to submit the comprehensive report on behalf of Lim Pak Tow and the Datuk Bandar then agreed in principle to the joint venture contract between the Datuk Bandar and the defendant. By a letter dated 1 September 1983 the plaintiff set out two alternative proposals for low cost flats to be built on the Government land as requested by the Government at the meeting held on 8 August 1983. At a meeting held at the plaintiff's office on 21 September 1983 Lim Pak Tow then requested the plaintiff to proceed with the preparation of detailed design drawings for the construction of the apartments. By its letter dated 28 September 1983 the plaintiff submitted the layout plans to the Dewan Bandaraya.

[6] On 1 March 1984 a joint venture agreement ('the JVA') was entered into between the Datuk Bandar Kuala Lumpur and the defendant to develop the lands into a township which then became known as the Bandar Syed Putra Project ('the project'). After the JVA was signed the gazette notification and the compulsory acquisition of Lots 19 and 21 were revoked.

[7] By a letter dated 6 October 1983 the plaintiff informed Lim Pak Tow that the architect's fee for the project was, inter alia, 5% of the total building costs. The plaintiff set out the terms of its appointment as the architect for the project by a letter dated 6 April 1984 to the defendant. The material parts of the letter read as follows:

> PROPOSED COMPREHENSIVE DEVELOPMENT AT JALAN PENGHULU MAT, (OFF FEDERAL HIGHWAY), KAMPUNG HAJI ABDULLAH HUKUM, KUALA LUMPUR
>
> We wish to thank you for our appointment as your architect for the above project and would be grateful if you would confirm the following terms of our appointment.
>
> 1 Fees
>
> Our fees shall be 4% of total building cost for the 1st block and 2% of total building cost for the subsequent repetitive blocks. Over and above, we shall also be paid 1% of the total infrastructure cost. However, the fee for residential units for Dewan Bandaraya shall be lump sum, that is $300.00 per unit for medium low and low cost and $600.00 per unit for medium cost flats as stipulated in your letter dated 5th January 1984.
>
> The fee will be initially computed on estimates of building and infrastructure cost and to be adjusted according to final account on completion of project or part of project by phases.
>
> 2 Mode of Payment
>
> The mode of payment to us shall be as agreed:
>
> 1 A monthly sum of $20,000.00 as part of the fees for the initial stage to the completion of schematic design phase to enable the engineers to commence their structural design work. Total to be paid — 10%
>
> 2 Design Development Phase — 10%
>
> 3 Contract Document Phase — 10%
>
> 4 Contract Management Phase will be spread over in equated over the contract management period — 60%
>
> 5 On completion of the whole Building and obtaining Certificate of Fitness — 10%
>
> 3 Abortion/Abandonment/Delay
>
> If the project is aborted, abandoned or delayed indefinitely, the fees computed to the nearest stage of work is payable.
>
> 4 Documentation
>
> The architect will supply the client with two (2) complete sets of as-constructed drawings on completion of the project without charge.
>
> All other direct costs such as printing charges, authorities' fees, etc are to be reimbursed separately. Kindly endorse on the attached copy and return the same to us to signify your agreement to the above terms.

A By a letter dated 14 June 1984 the defendant confirmed its acceptance of the appointment of the plaintiff as the architect for the project with the proviso that in the event changes or improvements were required in the subsequent repetitive lots, the fees for the repetitive lots would remain at 2% of the building costs. The defendant further confirmed the terms of appointment of the plaintiff by signing the letter dated 6 April 1984 from the plaintiff.

B

[8] Following the execution of the JVA, the plaintiff made a formal submission to complete the works under the schematic design phase, and upon approval proceeded to carry out works under the design development phase and contract document phase and contract management phase as defined in the Conditions of Engagement and C Scale of Professional Charges by LAM.

[9] IGB Corporation Sdn Bhd ('IGB') was sourcing for development projects from 1986 to 1988. They found the project area suitable for their development concept. On or about 15 July 1988 IGB bought over almost all the shares of Lim Pak Tow and D took over control of the management of the defendant. On 2 November 1988 IGB obtained approval for a new project on drawing prepared by their own architect.

[10] By a letter dated 1 November 1988 the defendant purported to discharge the plaintiff as the architect for the project since it was intended to utilise the services of E the architect of its present majority shareholder, IGB. The material parts of the letter read as follows:

> As recently discussed with your Mr Ooi, we are desirous of discharging you as Architects in respect of our proposed development on the lands held under GM 872 Lot 34, GM 755 Lot 19, GM 753 Lot 21, GM 776 Lots 23 & 25, Section 95A Town of Kuala Lumpur F together with the lands in respect of the Joint-Venture Agreement with Datuk Bandar Kuala Lumpur dated 1st March 1984. As IGB Corporation Berhad are now the majority shareholders in our company, we reiterate that we intend to utilise the services of architects presently retained by IGB Corporation Berhad. The present design for the development will not be used.
>
> Please let us have your final bill for your services in accordance with paragraph 3 of your G letter to us dated 6 April 1984.

[11] The plaintiff by its reply dated 7 November 1988 said as follows:

> We are in receipt of your letter dated 1 November 1988 in which you purport to terminate H your contractual obligation with us. We are to inform you that your attempt to discharge us as an architect is bad in law and of no effect as you have absolutely no legal cause to terminate our contract and clause 3 of our letter of 6 April 1984 is not applicable.
>
> Your internal management has absolutely nothing to do with your contractual obligation to us.

I

[12] Subsequently by a letter dated 26 January 1989 the defendant wrote to the plaintiff stating that the plaintiff's services as the architect for the project had been 'unequivocally and irrevocably terminated' as the project had been aborted. The material parts of the letter read as follows:

We are of the view that we have unequivocally and irrevocably terminated your services as our Architect in the above mentioned aborted project vide our letter dated 1 November 1988. Nevertheless, without prejudice to our rights to hold you responsible for all damages arising out of the delay in the new project from 1 November 1988 to the date hereof attributable to your failure in issuing the Letter of Release we once again state as follows:

(a) your services are terminated;

(b) we shall be appointing new Architects for the new project;

(c) you are to send us your final bill for work done (if any) within FIVE (5) days from the date hereof; and

(d) you are to send us your Letter of Release within FIVE (5) days from the date hereof upon our undertaking to settle your fees as may be ascertained by a forum of competent jurisdiction.

Needless to say, we shall be holding you responsible for all damages arising out of this further delay in the new project

[13] This resulted in an exchange of correspondence between the plaintiff and the defendant. As a result the plaintiff refused to give a letter of release for the appointment of new architects by the defendant for the new project. The plaintiff maintained that its discharge by the defendant was bad in law and of no effect. Subsequently the matter was referred to LAM. On 14 March 1989 the Joint LAM Practice Committee made a decision ('the LAM decision') which was communicated to the parties vide its letter dated 15 March 1989. The decision was to the effect that the defendant had the right to terminate the services of the plaintiff with or without assigning any reason. The material parts of the letter containing the LAM decision read as follows:

BANDAR SYED PUTRA DEVELOPMENT project

Your letter of 7 March 1989 and all pertinent documents were reviewed at the meeting of the Joint LAM/PAM Practice Committee held on 14 March 1989 and when the following decisions were taken:-

1 That there is no question that Bandar Incorporated Development Sdn Bhd has the right to terminate the services of Akitek Tenggara Sdn Bhd and to be able to do so with or without assigning any reason.

2 Thus as provided in Clause 17 of the Fourth Schedule (Rule 28) Part One — Conditions of Engagement of an Architect, Akitek Tenggara Sdn Bhd was obliged to submit their accounts for the balance of fees due together with any other outstanding claims for reimbursable charges not later than 30 days from the date of expiry of the notice of termination of the agreement. In this regard, Bandar Incorporated Development Sdn Bhd's letter dated 26 January 1989 left no doubt over the intent of their earlier letter dated 1 November 1988 which view was supported by Mr Tan Eng Keong and the undersigned at the meeting held on 23 February 1989. Hence, Akitek Tenggara Sdn Bhd was required by this provision of the Architects Rules 1973 to have submitted their accounts well before now.

3 Therefore if Akitek Tenggara Sdn Bhd had complied with the requirements as stated in paragraph 2 above, and irrespective of whether the quantum of their claim is disputed, in which event the provisions of Clause 21 of the same Rules would be applicable, the Letter of Release should already have been issued to enable Bandar Incorporated Development Sdn Bhd to be free to appoint another Architect and for that Architect to accept the appointment.

4 In view of the foregoing, it was decided that the requirement for a Letter of Release from Akitek Tenggara Sdn Bhd in this instance be waived and that Bandar Incorporated Development Sdn Bhd are now at liberty to appoint another Architect and for that Architect to accept the appointment.

[14] The plaintiff was dissatisfied with the LAM decision and commenced certiorari proceedings against it in the High Court on 10 June 1989. On 5 March 1990 the High Court quashed the LAM decision. LAM, being dissatisfied with the order made by the High Court, appealed to the Supreme Court. On 13 November 1990 the Supreme Court set aside the order made by the High Court.

[15] On 11 October 1991 the plaintiff commenced proceedings in the High Court against the defendant and IGB for the sum of RM2,031,568 being the balance of professional fees and disbursements due to it for actual work done under the contract as at the date of its termination plus interest and costs. When the trial commenced on 16 April 1997 the High Court allowed an oral application by the plaintiff to re-amend the statement of claim to include a new claim for the sum of RM7,705,382. This order was made despite objections from the defendant. After a full trial the High Court gave judgment in favour of the plaintiff for the sum of RM7,705,382 together with interest at the rate of 4% per annum from 1 November 1988 until 11 May 1999 and costs. In making his award RK Nathan J said:

> In *Thomas v Hammersmith Borough Council* [1938] 2 All ER 203 the Court of Appeal held that unless there is an agreement to the contrary, an appointment in explicit, and unqualified terms for a particular project cannot be determined until the purpose for the appointment has been achieved. However, in the event of clear agreement as to the purpose of the appointment any termination of the employment before the purpose of the appointment has been achieved, would amount to a breach of contract.
>
> In *Edwin Hill & Partners v Leak Cliffe Properties Ltd & Anor 29 BLR 43* the court held that the absence of a contractual right to terminate the engagement prior to completion of the services or the project means that the contract is in the nature of an entire contract. The court also rejected the defendant's argument that the right to terminate was to be implied. Such an argument failed because the parties had expressly dealt with what was to happen if the defendant was unable to proceed and had not made any arrangements for any other termination.
>
> In the light of these cases, is the plaintiff entitled to compensation and damages for work done to date of termination and the loss of net profits on the abandoned work or uncompleted services lost by reason of the aforesaid breach after deducting therefrom the cost to the plaintiff for providing the uncompleted services for the abandoned works or as pleaded in the alternative is the plaintiff entitled to treat the contract as at an end and sue upon a quantum meruit basis only?
>
> I find that on the basis of *Edwin Hill* when a contract of employment between the owner and the architect has been partly performed and there is a refusal or failure of the building owner to complete the project amounting to a repudiation on his part, the architect can, on general principle, sue for all sums due at the time. Alternatively, the plaintiff may treat the contract as at an end and is entitled to the damages based on the principle of quantum meruit (see *Hudson's Building & Engineering Contract* (11th Ed) Vol 1 para 2.260 p 390).
>
> However, the question remains whether the plaintiff is entitled to sue on the 'entire contract' or on 'quantum meruit'.

I had earlier held that neither has the project been aborted, abandoned nor delayed indefinitely. This is based on the admission of DW2 himself. The provision relating to payment of compensation where there is abortion, or abandonment of work or indefinite delay stipulates that upon such occurrence, then the fees computed to the nearest stage of work is payable. It is for the defendant to bring its case within this provision if it wishes to submit that the plaintiff is entitled only to a quantum meruit basis. But as I have held since I have found that the project as envisaged in the earlier JVA is still subsisting the defendant has failed to prove entitlement only under a quantum meruit basis.

This is a clear case of wanton cancellation of the contract by the defendant purely on the basis that it wished to utilise its own architects. I therefore hold that the plaintiff is entitled to sue for all sums due at the time of the breach and for the loss of profits on the work lost by reason of the breach.

I also find that the plaintiff's evidence in respect of particulars of loss and damage suffered by it as a result of its unlawful termination by the defendant in breach of the contract has not been seriously challenged in cross-examination by the defendant. The defendant solely relied on the evidence of DW2, one Sze To, and their architect.

In *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 the Court of Appeal commented on the need to put one's case to the other side in cross-examination. The details of loss and damage suffered by the plaintiff is set out in agreed Bundle E.

[16] The defendant appealed to the Court of Appeal. On 1 October 2001 the defendant had obtained leave from a differently constituted panel of the Court of Appeal to adduce fresh evidence at the hearing of the appeal. The defendant was ordered to file and serve a supplementary appeal record containing a sealed copy of the High Court order dated 11 May 1999. It was also ordered to amend the memorandum of appeal and to introduce in evidence the following documents:

(i) a copy of the approved layout plan dated 17 June 1997;

(ii) the letter dated 8 December 1998 from Dewan Bandaraya Kuala Lumpur granting approval for the development plans;

(iii) a copy of all cause papers and the notes of proceedings in the High Court of Malaya at Kuala Lumpur in respect of the Originating Motion No R8–25–46 of 1989;

(iv) the order of the Supreme Court dated 13 November 1990 in respect of the Supreme Court Civil Appeal No 02–124 of 1990; and

(v) all relevant cause papers together with the Record of Appeal in the Supreme Court Civil Appeal No 02–124 of 1990.

[17] The appeal in the Court of Appeal centred on two issues. They were:

(a) whether the defendant can terminate the plaintiff's services under the contract; and

(b) the quantum of damages to be awarded to the plaintiff.

[18] With regard to the first issue the Court of Appeal ruled that the question of the termination of the services of the plaintiff was res judicata and thus cannot be

re-litigated. As Abdul Kadir Sulaiman JCA (as he then was) in writing for the court said (at pp 233–234 in *Midvalley City Sdn Bhd & Anor v Arkitek Tenggara Sdn Bhd* [2005] 6 MLJ 222):

> [21] LAM/PAM being dissatisfied with the High Court order then appealed to the Supreme Court. The Supreme Court (comprising of YAA Tun Dato' Abdul Hamid bin Hj Omar LP, Dato Ajaib Singh SCJ and Dato Hj Mohd Jemuri bin Serjan SCJ) unanimously allowed the appeal of LAM/PAM and set aside the High Court order. We have carefully scrutinised the appeal record before the Supreme Court which is found in the supplementary appeal record. We hold that the issue of the validity of the appellants' termination of the respondent's services under the contract was considered and determined by the High Court and the Supreme Court.
>
> [22] The effect of the Supreme Court order was that the LAM/PAM decision was restored and was hence valid and binding on the parties. The Supreme Court Order had in fact upheld and affirmed the LAM/PAM decision and is binding on all the parties including the appellants before us. We therefore reject the respondent's submission that the Supreme Court Order only dealt with the issue of the letter of release and did not deal with the issue whether the appellants had the right to terminate the respondent's services under the contract.
>
> [23] The trial judge had in his grounds of judgment stated that the appellants had submitted that the issue of the termination of the contract was already dealt with by the Supreme Court Order and the issue was res judicata (record of appeal volume 1 at p 32). However, the trial judge did not deal with this critical issue before arriving at his finding. We are aware that the appeal record before the Supreme Court which was made available to us in the supplementary appeal records was not available to the trial judge. The failure of the judge to deal with the Supreme Court Order and the doctrine of res judicata was a serious misdirection that justifies our appellate intervention.
>
> [24] Having examined the effect of the Supreme Court Order, it is clear to us that the three decisions made by LAM/PAM have been conclusively adjudicated and decided with finality by the Supreme Court. The matter is now clearly res judicata and it cannot be re-opened and re-litigated by the parties or their privies. It is in the public interest that there should be finality in litigation and the sanctity and validity of the Supreme Court order being the decision of the highest court in our country must be respected and obeyed by all other courts. In*Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at pp 197–198 the Supreme Court held that:
>
> > What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the re judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*.

[19] With regard to the second issue the Court of Appeal set aside the award of damages made by the High Court. As Abdul Kadir Sulaiman JCA (as he then was) in writing for the court said:

> The respondent's claim for the sum of RM7,705,382 was premised on the basis that if the said contract was not terminated on 1 November 1988, the respondent would have earned

the said sum for the entire completion of the whole project. The respondent computed that the total fees expected to be earned under the contract would have been RM9,476,688. The respondent then deducted the architectural costs of remaining works as at the date of termination amounting to RM1,141,306. After deducting the sum of RM630,000 which the respondent had already received from the appellants, the respondent claimed loss and damage of RM7,705,382.

The principal basis upon which the trial Judge awarded the sum of RM7,705,382 as losses suffered or the respondent's loss of profits was based on his finding that the contract was unlawfully terminated and that it was an entire contract. In the light of our interpretation and finding that the Supreme Court Order had already dealt with the issue of the validity of the termination of the contract, the learned judge's basis and foundation for the award of damages or loss of profits of RM7,705,382 cannot be sustained in law.

We therefore hold, with respect, that the trial judge had acted on a wrong principle or had made an entirely erroneous estimate of the damages. We therefore set aside the award of damages of RM7,705,382 made by the trial Judge. …

We now consider whether the respondent should be awarded any damages upon termination of their services. As we have stated earlier, the respondent had as alternative to damages for breach of contract claimed for work done in the sum of RM2,006,373. The particulars of this claim have been pleaded by the respondent in paragraph 14 of the re-amended statement of claim as follows:

Particulars of work done upon termination

Work done in Schematic

Design Phase (15% of

Total Architect Fees)

RM 1,421,503.00

Work done in Design

Development Phase (35% of Total

Architect Fees for Blocks 1,5,7,8,

17,18,19 and the infrastructure

RM 854,422.00

Work done in Contract

Documentation Phase (25% of

Total Architect Fees for Block 1

and the infrastructure)

RM 128,969.00

Amendments due to changes

in instructions for Block 1

RM 221,463.00

Printing Charges RM 10,016.00

A Total Fees Due RM 2,636,373.00

Less: Fees Paid RM 630,000.00

AMOUNT DUE RM 2,006,373.00

B ---

The respondent's counsel had also repeated the same particulars in his written submission in the High Court below dated 9.10.1998 preceding them with the following paragraph:

> 10.1 It is submitted that as at the date of the defendant's unlawful termination of the plaintiff's services the plaintiff had completed works amounting to RM2,636,373. Taking into account the deduction there from of the payment of the sum of RM630,000 received by the plaintiff from the defendant todate a sum of RM2,003,373 is due and payable by the defendant to the plaintiff.' (appeal record volume 2 p 471)

Before us, the appellant's counsel made a fair concession that irrespective of whether the termination of the respondent's services under the contract was lawful or not, the respondent was entitled to be paid for work done up to the date of the said termination. He submitted that at all material times, from the date of the termination of the contract on 1 November 1988 up to the first day of trial on 16 April 1997, that is over a period of about nine years, the respondent had throughout maintained that the actual amount of damages due from the appellants to the respondent was the sum of RM2,006,373, which was for work done up to the date of termination.

In the light of our finding that the Supreme Court order had determined that the appellants had the right to terminate the respondent's services with or without assigning any reason, the respondent is only entitled to claim a reasonable charge for the work done up till the date of termination. We are supported in this finding by the fact that the respondent was paid his monthly professional fees of RM20,000 and further fees progressively for actual work done. This was the system and pattern of payment of the respondent's professional fees under the said contract. We have carefully examined the contract and it is our finding that the respondent was engaged as a professional firm of architects to render professional architectural services to the appellants for the project. The contract only refers to the payment of fees.

Accordingly we hold that the respondent is entitled to be paid all the fees for work done up to the date of termination as prayed for by the respondent as alternative to prayer (b) in the re-amended statement of claim and in paragraph 10.1 of the respondent's written submission in the court below. That sum claimed by the respondent was RM2,006,373. There is no dispute between the parties that pursuant to the judgment of the High Court the appellants had on 15 July 1999 paid the respondent the sum of RM2,000,000. In the result the appellants were ordered to pay the respondent the balance sum of RM6,373 together with interest thereon at the rate of 8% per annum from 11 May 1999 till the date of full realisation. We also ordered that the appellants pay the respondent interest at the rate of 8% per annum on the sum of RM2 million from 11 May 1999 till the date when this sum was paid to the respondent, ie 15 July 1999. We also awarded costs to the appellants both here and in the Court below.

[20] The plaintiff was granted leave to appeal to this court on the following questions of law:

(a) Is LAM competent to decide on the lawfulness or otherwise of the termination of an architect by his client; and

(b) If the answer to question (a) above is in the negative, was the termination of the plaintiff herein by the defendant lawful? A

[21] The questions will now be considered.

[22] Is LAM competent to decide on the lawfulness or otherwise of the termination of an architect by his client? B

[23] The Court of Appeal had ruled that as the LAM decision had been conclusively adjudicated and decided with finality by the Supreme Court it had become res judicata and cannot therefore be reopened and re-litigated by the parties. C Accordingly, it was contended by the defendant, the lawfulness or otherwise of the termination of an architect by his client is res judicata and thus cannot be raised now as it ought to have been raised in the course of the earlier proceeding. This submission brings into focus the question of whether the LAM decision constitutes res judicata by reason of being a decision of the Supreme Court or, if not, D by reason of being a decision of LAM. If the answer to both or either one of the questions is in the affirmative then the issue raised by the plaintiff cannot be entertained as it ought to have been raised in the earlier proceeding. In this regard reference may be made to*Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 where Peh Swee Chin FCJ referred to *Henderson v Henderson* (1843) 3 Hare 100 where Wigram VC said at p 115: E

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time. F

[24] In order to determine whether the LAM decision is capable of amounting to res judicata by virtue of being a decision of the Supreme Court it is first necessary to ascertain the meaning of the term 'res judicata'. The classic text *Res Judicata* by Spencer Bower and Turner (3rd Ed) defines it at p 1 as follows: G

> In English law a res judicata is a decision pronounced by a judicial tribunal having jurisdiction over the cause and the parties which disposes once and for all of the matters decided, so that except on appeal they cannot afterwards be relitigated between the same parties or their privies. H

[25] It is thus clear that res judicata applies only in respect of a matter over which the court has pronounced a judgment.

[26] In this case the LAM decision was upheld by the Supreme Court pursuant to a proceeding for judicial review. It is settled law that judicial review is concerned with I the process of decision making and not with the decision itself (see *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). In *Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor* [1987] 1 MLJ 124 Abdoolcader SCJ said at p 127:

A It is of considerable significance to bear in mind that judicial review is of the hearing and not of the decision.

[27] MP Jain in his book entitled *Administrative Law of Malaysia and Singapore* (3rd Ed) says at pp 625 – 626:

B

> A review court does not substitute its own decision for that of the original decision making body. A review court can only grant one or more of the specific remedies, eg an order quashing the decision of the decision-making body. Many a time, therefore, judicial review is superficial and marginal and does not attack the heart of the problem, viz whether the administrative decision is right or wrong in the circumstances of the case.

C

[28] As a judicial review proceeding is concerned with the decision-making process and not with the decision itself the decision cannot constitute res judicata of the court upholding the decision making process. Thus in *R v Secretary of State for the Environment; ex parte Hackney LBC & Anoer* [1983] 3 All ER 358 May LJ in D adopting a statement from *Wade on Administrative Law* (5th Ed) said at p 367:

> ... in these procedures the Court 'is not finally determining the validity of the tribunal's order as between the parties themselves' but 'is merely deciding whether there has been a plain excess of jurisdiction or not'. They are a special class of remedies designed to maintain due order in the legal system, nominally at the suit of the Crown, and they may well fall E outside the ambit of the ordinary doctrine of res judicata.

[29] In this case the Supreme Court did not pronounce any judgment on the decision made by LAM. It is therefore an error to describe the LAM decision as constituting res judicata by virtue of being a decision of the Supreme Court.

F

[30] Be that as it may, the conclusion just arrived at does not bring the matter to an end. The LAM decision is capable of constituting res judicata by reason of being a decision of LAM itself. LAM is not a court. What thus requires immediate consideration is the extent to which the doctrine of res judicata can extend to a G tribunal which is not a court. This is resolved by the judgment of the High Court of Australia in *The Administration of the Territory of Papua and New Guinea & Anor v Daera Guba* (1973–1974) 130 CLR 353 where Gibbs J said at p 453:

> In many of the authorities that discuss this form of estoppel, it is said that the estoppel is brought about by a judicial decision, pronounced by a judicial tribunal. Thus in a recent H case, *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at p 933, Lord Guest said:
>
> > The rule of estoppel by res judicata, which is a rule of evidence, is that where a final decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to and the subject matter of the litigation, any party or privy to such litigation as I against any other party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits (Spencer Bower on *Res Judicata*, p 3.
>
> The use of the phrase 'judicial tribunal' in this context is convenient as indicating that an estoppel of this kind does not result from a mere administrative decision, but the question whether such an estoppel is raised is not answered by inquiring to what extent the tribunal

exercises judicial functions, or whether its status is judicial or administrative: see *Caffoor v Commissioner of Income Tax, Colombo, per Lord Radcliffe* [1961] AC 584, at pp 597–599. A fairly obvious example is the case of a court-martial, whose sentence might in some circumstances be pleaded as an estoppel (*Hannaford v Hunn* (1825) 2 C & P 148, at p 155), although not made in the exercise of judicial power (cf *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, at pp 466–468; *R v Cox; Ex parte Smith* (1945) 71 CLR 1, at p 23). The doctrine of estoppel extends to the decision of any tribunal which has jurisdiction to decide finally a question arising between parties, even if it is not called a court, and its jurisdiction is derived from statute or from the submission of parties, and it only has temporary authority to decide a matter ad hoc: see *Halsbury's Laws of England* (3rd Ed) Vol 15, pp 212–214; Spencer Bower & Turner on *Res Judicata* (2nd Ed, 1969), pp 21–28.

[31] It follows that the test to be applied in determining whether the decision of a tribunal, which is not a court, is capable of constituting res judicata is whether it has jurisdiction, derived either from statute or from the submission of parties, to decide finally a question arising between the parties before it. As Thomson CJ (as he then was) said in *Leong Cheong Kweng Mines Ltd v Kok Hoong* [1962] MLJ 224 at p 226:

> Res judicata in the strict sense arises where a matter has been litigated between parties and litigated to a final decision.

[32] A final decision in this sense means that it leaves nothing to be judicially determined or ascertained thereafter in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review or modification by the tribunal which pronounced it (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90; *Kandiah Peter a/l Peter v Public Bank Bhd* [1994] 1 MLJ 119). The LAM decision will therefore constitute res judicata as a decision of LAM only if it had jurisdiction to render a final decision on the dispute.

[33] The first issue to be resolved is therefore whether LAM had jurisdiction to make a decision on the matter referred to it. Section 4 of the Architects Act 1967 ('s 4') deals with the functions of LAM. With regard to the hearing and determination of disputes s 4(e) provides as follows:

> The functions of the Board shall be —
>
> > to hear and determine disputes relating to professional conduct or ethics of Architects and registered Building Draughtsmen and to appoint a committee or arbitrator or arbitrators to hear and determine such disputes;

[34] It is clear that LAM is only empowered to hear and determine disputes relating to professional conduct. The section gives no power to LAM to hear disputes between an architect and his client. Specific provision has been made for the resolution of such disputes. It is contained in r 21 of the Fourth Schedule to the Architects Rules 1973 as amended in 1986 ('r 21'). It reads as follows:

> In the event of any dispute between the Architect and the client, whether arising during or after the rendering of the services under the agreement, either party shall give notice in

writing to the other party informing him of the matter in dispute and requiring its settlement. The parties shall then appoint an Arbitrator but if they fail to do so within 14 days of the date of the notice, either party may submit a written request to the President of the Board of Architects to appoint a person to serve as an Arbitrator, whose award shall be final and binding on both the Architect and the client.

[35] As the dispute in this case is one that relates to the agreement between an architect and his client with regard to services rendered it has nothing to do with the professional conduct of the architect. The procedure laid down by law to be followed in respect of the dispute in this case is therefore as in r 21. It is an established principle that a tribunal created by statute has only such powers as are conferred by the statute which creates it (see *Lee Wah Bank Ltd v National Union of Bank Employees* [1981] 1 MLJ 169). It has no inherent jurisdiction unlike the High Court (see *Bank Pusat Kerjasama Bhd (in liquidation) v Mahkamah Perusahaan Malaysia & Anor* [1994] 3 MLJ 537). It follows that LAM had no jurisdiction to entertain the dispute between the parties. Where a tribunal makes a decision which is outside its jurisdiction it is null and void (see *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657). The LAM decision is thus in that position and is of no effect. In any event the LAM decision is not final in the sense that it is not complete as no decision was made on the claim for fees thereby making it incapable of operating as res judicata. It can at best be described as a decision relating to the letter of release which may well be a matter of professional conduct within the meaning of s 4(e).

[36] The corollary is that the LAM decision cannot constitute a res judicata between the parties even as a decision of LAM. The rationale underlying this conclusion is sufficient to answer the first question which is that LAM is not competent to decide on the lawfulness or otherwise of the termination of an architect by his client in view of the specific procedure contained in r 21.

[37] That leads to a consideration of the second question.

[38] As the answer to the first question is in the negative was the termination of the services of the plaintiff by the defendant lawful?

[39] The lawfulness or otherwise of the termination of the services of the plaintiff by the defendant would, in the first place, depend on whether the agreement between them contains a right to terminate. The plaintiff submitted that the agreement does not contain a termination clause expressly or by implication. Thus the agreement can be terminated only by mutual consent or by law, for example, by the operation of s 40 of the Contracts Act 1950 ('s 40'). Reference was made to *Thomas v Hammersmith Borough Council* [1938] 3 All ER 203 and *Edwin Hill & Partners v Leakcliffe Properties Ltd & Anor* (1984) 29 BLR 43 to support the stand that an entire contract, as in this case, cannot be determined until the contract has been completed in the absence of an agreement to the contrary. Accordingly, it was contended that the termination of the agreement by the defendant was unlawful. The defendant, on the other hand, submitted that the terms of the agreement between the parties are not confined to the letter dated 6 April 1984 but also included relevant provisions of the

Architects Rules 1973 in particular r 7 of the Fourth Schedule ('r 7') which conferred a right of termination. It was therefore the submission of the defendant that the termination of the agreement was lawful.

[40] It is true that the agreement between the parties as contained in the letter dated 6 April 1984 from the plaintiff to the defendant does not prescribe any express right of termination. What now requires deliberation is whether the relevant provisions of the Architects Rules 1973 can be implied into the agreement. They read as follows:

> Rule 27
>
> A person registered under the Act shall, in the exercise of his profession, observe and be guided by such of the provisions of the Code of Professional Conduct in the Third Schedule as are applicable to him.
>
> Rule 2(3) of Third Schedule
>
> A person registered under the Act shall, in the exercise of his profession, observe and be guided by such of the provisions of the Code of Professional Conduct in the Third Schedule as are applicable to him.
>
> Rule 28
>
> Except with the prior agreement of the Board given for special reasons, an Architect or registered building draughtsman shall only enter into an engagement for his professional services upon the conditions in the Fourth Schedule.
>
> Rule 7 of Fourth Schedule
>
> An engagement entered into between an Architect or a registered building draughtsman and a client may be terminated at any time by either party upon reasonable notice being given.

[41] It is now appropriate to consider the circumstances in which a term can be implied in a contract. *Chitty on Contracts* (28th Ed) Vol I contains a summary of the position at para 13-004 in the following words:

> In many cases, however, one or other of the parties will seek to imply a term from the wording of a particular contract and the facts and circumstances surrounding it. The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. An implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. These two criteria often overlap and, in many cases, have been applied cumulatively, although it is submitted that they are, in fact, alternative grounds. Both, however, depend on the presumed intention of the parties.

[42] The distinction between the two types of implied terms was explained by Lord Cross of Chelsea in *Liverpool City Council v Irwin* [1977] AC 239 at pp 257–258:

> "When it implies a term in a contract the court is sometimes laying down a general rule that in all contracts of a certain type — sale of goods, master and servant, landlord and tenant

A and so on — some provision is to be implied unless the parties have expressly excluded it. In deciding whether or not to lay down such a prima facie rule the court will naturally ask itself whether in the general run of such cases the term in question would be one which it would be reasonable to insert. Sometimes, however, there is no question of laying down any prima facie rule applicable to all cases of a defined type but what the court is being in effect asked to do is to rectify a particular — often a very detailed — contract by inserting in it
B a term which the parties have not expressed. Here it is not enough for the court to say that the suggested term is a reasonable one the presence of which would make the contract a better or fairer one; it must be able to say that the insertion of the term is necessary to give — as it is put — 'business efficacy' to the contract and that if its absence had been pointed out at the time both parties – assuming them to have been reasonable men — would have agreed without hesitation to its insertion.

C

[43] In *Mosvolds Rederi A/S v Food Corporation of India* (1986) 2 Lloyd's Rep 68 Steyn J referred to three categories of implied terms at p 70:

Sometimes it is said that a term is implied into the contract when in truth a positive rule
D of law of contract is applied because of the category in which a particular contract falls. … Another type of implied term is a term implied in order to give business efficacy to the contract. The basis of such an implication is that the contract is unworkable without it. … There is, however, another form of implication …. It is not permissible to imply a term simply because the Court considers it to be reasonable term. … On the other hand, it is possible to imply a term, if the Court or arbitrator, as the case may be, is satisfied that
E reasonable men, faced with the suggested term which ex hypothesi was not expressed in the contract, would without hesitation say: 'yes, of course, that is so obvious that it goes without saying'.

[44] In commenting on implied terms in contracts of a particular type the *Law of*
F *Contract* by Cheshire and Fifoot, 7th Australian Edition says at p 352:

Whenever a contract can be said to be of a particular class (or nature, type, kind, description: see eg *Breen v Williams* (1996) 186 CLR 71 at p 103; *Byrne v Australian Airlines Ltd* (1995) 131 ALR 422 at pp 426, 448), the court implies any term which is inherent to that class, on the basis that such terms are 'the legal incidents of a particular class of contract' (*Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at p 345;
G *Byrne v Australian Airlines Ltd* (1995) 131 ALR 422 at p 426; *compare Simonious Vischer & Co v Holt & Thompson* (1979) 2 NSWLR 322 at p 348 ['duty prima facie imposed by law on the parties to particular kinds of contracts']). However, such a term is not implied where it is inconsistent with the actual agreement of the parties (*Byrne v Australian Airlines Ltd* (1995) 131 ALR 422 at p 449; *Castlemaine Tooheys Ltd v Carlton & United Brewers Ltd*
H (1987) 10 NSWLR 468 at pp 490–3; *Devefi v Mateffy Perl Nagy Pty Ltd* (1993) 113 ALR 225 at p 440).

[45] The effect of the Architects Rules 1973 on an agreement entered into between an architect and his client is demonstrated by the case of *Sidney Kaye, Eric Firmin &*
I *Partners v Leon Joseph Bronesky* (1973) 4 BLR 1. The issue in that case was whether the Royal Institute of British Architects ('RIBA') Conditions of Engagement, which contains elaborate provisions as to the terms which architects are required by their Institute to incorporate in a contract, must be read into an agreement between an architect and his client. The majority (Cairns LJ and Scarman LJ) took the view that the RIBA Conditions of Engagement did not themselves constitute a contract; they

could have no operation as between an architect and his client except by incorporation in a contract. Lawton LJ, however, took the view that it would depend on whether the parties had intended that the Conditions of Engagement should apply. As he said in his judgment:

> Mr Bingham in the course of his submission to the court reminded us that when the court comes to consider the question of contract, the problem is to find out what the intention of the parties was, so far as it is possible to do so. The court looks for the intention of the parties by construing the words of the contract against the background of the surrounding circumstances; and in this case it seems to me that the surrounding circumstances are of some importance. The plaintiffs, being a firm of architects, were dealing with a man, a defendant, who was a property developer. It follows that both sides were acquainted with the normal contractual relations between architects and their clients … … … It seems to me, therefore, that the right view is that the parties intended save in regard to the calculation of fees, that the Conditions of Engagement should apply, containing as they do the arbitration clause.

[46] If the majority view is to be followed it would mean that the Conditions of Engagement in the Fourth Schedule would be inapplicable to the agreement between the plaintiff and the defendant as they have not been incorporated into the agreement. That would result in there being no right to terminate the agreement on the grounds stated in the letter dated 1 November 1988. In that event the termination of the agreement by the defendant would be unlawful. However, the minority view expressed by Lawton LJ is more attractive as the circumstances of a case may indicate that the parties intended the conditions of engagement to be applicable as implied terms even though not expressly incorporated in the contract between them. In determining whether there can be an implied right of termination in the agreement it is necessary to refer to cl 3 of the letter dated 6 April 1984 ('cl 3'). It provides that if the project is aborted, abandoned or delayed indefinitely, the fees computed to the nearest stage of work is payable. This, in actual fact, is a reference to the damages payable in the circumstances enumerated in c 3. That would arise only when the agreement has been brought to an end. An agreement is brought to an end only when it is terminated. Thus cl 3 refers to the consequences of a termination of the agreement in the circumstances mentioned. However, it leaves open the question of whether the agreement can be terminated on other grounds. As cl 3 refers to only damages payable in the circumstances enumerated therein it may or may not prohibit the termination of the agreement on other grounds in which event the damages payable have to be computed on a different basis. The termination of the agreement on grounds other than those stated in cl 3 is not an express term. The question of whether such a term can be implied would depend upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances (see *Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* (1983) 1 Lloyd's Rep 551). It must be remembered that where the Conditions of Engagement in the Fourth Schedule have not been dispensed with pursuant to r 28 of the Architects Rules 1973 an architect shall only enter into an agreement with his client upon the conditions. Thus it is illogical for the plaintiff to contend that there was no right of termination in the agreement in the absence of evidence to show that the conditions have been dispensed with. On the other hand the defendant submitted that the conditions must be implied into the agreement. In his evidence Mr Lim Pak Tow, the defendant's first witness, said that even though the agreement

A did not provide for any right of termination it was the understanding that since the plaintiff is a professional employed by the defendant the defendant would be entitled to terminate their services at any time upon giving reasonable notice. It must be presumed that the plaintiff had knowledge of the Conditions of Engagement in the Fourth Schedule. He is bound to adopt them. The defendant was under the B impression that it was entitled to terminate the agreement at any time. This, in substance, is the right contained in r 7. This makes it clear that a right to terminate the agreement on any ground is therefore the obvious, but unexpressed, intention of the parties thereby making it into an implied term. The Conditions of Engagement in the Fourth Schedule also constitute implied terms in order to give business efficacy to the agreement by virtue of being a custom or practice of the architectural C profession. It was on that basis that the High Court in *Datin Peggy Taylor v Udachin Development Sdn Bhd* [1984] 1 MLJ 85 adopted the Scale of Professional Charges prepared by the Malaysian Institute of Architects for assessing the remuneration payable when the employer abandons the project. On appeal to this court this finding was not challenged by the parties (see *Udachin Development Sdn Bhd v Datin Peggy* D *Taylor* [1985] 1 MLJ 121). In *CS Khin Development Sdn Bhd v Chung Yoke Onn* [1985] 2 MLJ 319 Lee Hun Hoe CJ (Borneo) said at p 321:

> In *Datin Peggy Taylor v Udachin Development Sdn Bhd* [1984] 1 MLJ 85 the Court considered that the 'Pertubuhan Akitek Malaysia' (PAM) guidelines should be imported because they reflected the custom or practice of the profession of the architects and could E be relied upon or could be called in aid when the contingency of abandonment was not provided for in any agreement. In such a situation the Court took the view that it was right to take into account the prevailing practice of the architectural fraternity in order to give business efficacy to the contract of employment where the architect through no fault of his own had to cease his professional duties.

F **[47]** The result ought to be the same in the incorporation of the Conditions of Engagement in the Fourth Schedule when there is no right of termination in a contract between the parties. Accordingly, on the facts of this case r 7 must be read as an implied term in the agreement between the plaintiff and the defendant. It follows that the agreement between the plaintiff and the defendant may be G terminated at any time by either party upon reasonable notice being given.

[48] The resultant matter for consideration is whether reasons must be given for the termination of the agreement. Rule 7 is silent on this. However, in certain instances it may be implied that a right to terminate may be exercised only upon H good cause being shown (see *Timeload Ltd v British Telecommunications Plc* (1995) EMLR 459). In deliberating whether such an implication can be made in this case it is necessary to consider cl 3. It reads as follows:

> If the project is aborted, abandoned or delayed indefinitely, the fees computed to the nearest stage of work is payable.

I

[49] This clause prescribes the fees payable upon a termination of the agreement on the grounds enumerated therein. However, as stated earlier a reading of this clause on its own leaves in doubt whether it has in contemplation termination of the agreement for other reasons. This doubt is resolved with r 7 being read as an implied

term of the agreement. The right to terminate the agreement pursuant to r 7 is wide ranging and goes beyond the purview of cl 3. Rule 7 does not prescribe any limit on the reasons for which the agreement may be terminated. Thus the reason for the termination of the agreement is necessary in order to determine whether the damages payable fall within cl 3 or some other basis. It thus becomes a necessary term to be implied as an incident of the agreement. In any event even if there is no obligation to assign any reasons for the termination of a contract and a reason is in fact given it is liable to be scrutinised by a court of law (see *Yarlagadda China Rattayya v Donepudi Venkataramayya* AIR 1959 551).

[50] The reason given by the defendant for the termination of the services of the appellant is subject to review by the court. The letter dated 1 November 1988 contained two reasons for the termination of the contract. They are:

(a) IGB, being the current majority shareholder, wished to utilise the services of its own architect; and

(b) The present design for the development will not be used.

[51] By letter dated 26 January 1989 to the plaintiff the defendant referred to the letter dated 1 November 1988 and the termination of the services of the plaintiff in the ' … aborted project … '. The fact that IGB wished to utilise the services of its own architect does not indicate any fault on the part of the plaintiff. The termination was due solely for the reason that the new majority shareholders of the defendant wanted to use the services of their own architect with a new development plan. It was a reason brought about by the act of the defendant itself. The use of a new plan for the development is on the same footing. It was brought about by the act of the defendant itself in wanting to have a new development concept. The question of the project having been aborted was not stated to be a reason in either of the two letters for the termination of the services of the plaintiff. It simply cannot be a reason as at that time the project had not been aborted yet. The reason for which a contract is not performed must exist at the time it is terminated (see *British & Beningtons Ltd v NW Cachar Tea Co* (1923) AC 48). However, the termination of a contract, based upon a reason that is in fact inadequate, may nevertheless be supported if there are at the time facts in existence which would have provided a good reason (see *Universal Cargo Carriers Corpn v Citati* [1957] 2 QB 401). As the project was aborted at a later stage it cannot constitute a reason for the termination of the agreement. In any event the project was subsequently aborted by the act of the defendant itself in wanting to have a new development concept. The result is that the services of the plaintiff was terminated for reasons brought about by the acts of the defendant itself. In other words the defendant had disabled itself from performing the contract. The critical issue for determination is the validity of the termination of a contract on such grounds. The position where a person disables himself from performing an agreement is governed by s 40 which reads as follows:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[52] In commenting on the circumstances in which a person may disable himself from performing his promise within the meaning of s 39 of the Indian Contracts Act (equivalent to our s 40) *Indian Contract and Specific Relief Acts* by Pollock & Mulla (11th Ed) Vol 1 says at p 532:

> The principle that in the absence of an express provision in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach (*Alghussein Establishment v Eton College* [1991] 1 All ER 267).
>
> It is very old law that if a promisor disables himself from performance, even before the time for performance has arrived, it is equivalent to a breach

[53] It is perhaps useful to consider the judgment of the House of Lords in *Alghussein Establishment v Eton College* [1991] 1 All ER 267 referred to in the above passage in detail. As Lord Jauncey said at pp 270–273:

> My Lords, it is well established by a long line of authority that a contracting party will not in normal circumstances be entitled to take advantage of his own breach as against the other party. In *Rede v Farr* (1817) 6 M & S 121 at pp 124–125, 105 ER 1188 at pp 1189–1190 Lord Ellenborough CJ said:
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> > In this case, as to this proviso, it would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong, if we were to hold that a lease, which in terms is a lease for twelve years, should be a lease determinable at the will and pleasure of the lessee; and that a lessee by not paying his rent should be at liberty to say that the lease is void. On this principle, even if it were not borne out so strongly as it is by the current of authorities, it would be sufficient to hold that the lease was only void as against the lessee, not against the lessor.
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> In *Doe d Bryan v Bancks* (1821) 4 B & Ald 401 at p 402, 106 ER 984 a lease of a coal mine contained the following proviso:
>
> > Provided also, and it is mutually agreed between the parties hereto, that the aforesaid works should commence and begin within one year from the date thereof, and if the same should stop or cease working at any time two years, this lease shall be deemed void to all intents and purposes. (My emphasis.)
>
> Bayley J said (4 B & Ald 401 at pp 406–407, 106 ER 984 at p 986):
>
> > I am of opinion, that the true construction of the proviso in this lease, 'that it shall be null and void to all intents and purposes upon a cesser of two years,' is, that it shall be voidable only at the option of the lessor, and that it does not lie in the mouth of the lessee, who has been guilty of a wrongful act, in omitting to work in pursuance of his covenant, to avail himself of that wrongful act, and to insist, that thereby the lease has become void to all intents and purposes.
>
> Holroyd J concluded that the tenant could not insist that his own act amounted to a forfeiture and Best J said (4 B & Ald 401 at pp 409 – 410, 106 ER 984 at p 987):
>
> > Besides, I take it to be an universal principle of law and justice, that no man can take advantage of his own wrong. Now it would be most inconsistent with that principle,

to permit the defendant to protect himself against the consequences of this action, by afterwards setting up his own wrongful act at a former period. A

In the Court of Appeal in the *New Zealand Shipping case* (1917) 2 KB 717 at pp 723–724 Viscount Reading CJ said:

Unless the language of the contract constrains the Court to hold otherwise, the law of England never permits a party to take advantage of his own default or wrong. In *Malins v Freeman* (1838) 4 Bing NC 395 at p 399, 132 ER 839 at p 841) Coltman J said: 'It is so contrary to justice that a party should avoid his own contract by his own wrong, that unless constrained, we should not adopt a construction favourable to such a purpose.' That appears to me to be the true underlying principle of the case in which the word 'void' has been construed as if it meant voidable. Unless there are clear words to the contrary, a clause making a contract void must be read subject to the condition that the party who is seeking to set up the invalidity is not himself in default. B C

And Scrutton LJ said:

I think that clause 12 and all other clauses are to be read subject to an overriding condition or proviso that the party shall not take advantage of his own wrong, and therefore is estopped from alleging invalidity of which his own breach of contract is the cause. D

On appeal to this House, Lord Finlay LC said ([1919] AC 1 at p 8, [1918–19] All ER Rep 552 at p 556): E

Questions of this sort have often arisen in case of provisions that a lease should be void on non-payment of rent or non-performance of covenants by the lessee. It has always been held that the lessee could not take advantage of his own act or default, to avoid the lease, and the expression generally employed has been that such proviso makes the lease voidable by the lessor, or void at the option of the lessor. The decisions on the point are uniform, and are really illustrations of the very old principle laid down by Lord Coke (Co Litt 206b) that a man shall not be allowed to take advantage of a condition which he himself brought about. F

The speech of Lord Atkinson contained the following passage ([1919] AC 1 at p 9, [1918–19] All ER Rep 552 at p 556): G

It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard … But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract. The application to contracts such as these of the principle that a man shall not be permitted to take advantage of his own wrong thus necessarily leaves to the blameless party an option whether he will or will not insist on the stipulation that the contract shall be void on the happening of the named event. To deprive him of that option would be but to effectuate the purpose of the blameable party. When this option is left to the blameless party, it is said that the contract is avoidable, but that is only another way of saying that the H I

A blameable party cannot himself have the contract made void, cannot force the other party to do so, and cannot deprive the latter of his right to do so. Of course, the parties may expressly or impliedly stipulate that the contract shall be voidable at the option of either party to it. I am not dealing with such a case as that.

In the Privy Council case of *Quesnel Forks Gold Mining Co Ltd v Ward* (1920) AC 222 the B Board had to consider a provision in a mining lease for forfeiture in the event of the lessee ceasing for two years to carry on mining operations. In giving the advice of the Board Lord Buckmaster said (at p 227)

> If the covenant does not effect this, then, although the word used is 'void', the meaning is 'void at the option of the lessor', or in other words 'voidable'. Their Lordships have no C hesitation in saying that that is the true meaning of the covenant. Substantial obligations are imposed upon the lessee under the terms of the lease; and it would not be consistent with the ordinary rules of construction applicable to such a document to hold that these obligations could be completely avoided by the lessee omitting to perform any work. It is of course possible so to frame a lease that this must be the effect, and it would result that the term was then a term which ended on the happening of a condition solely in the D power of a lessee. This, however, is not the language used in the lease.

He later referred to the *New Zealand Shipping case* (1919) AC 1, (1918–19) All ER Rep 552 as authority for well-known rules of construction. Finally, in *Cheall v Association of Professional Executive Clerical and Computer Staff* (1983) 1 All ER 1130 at p 1134, (1983) 2 AC 180 at pp 188–189 Lord Diplock, referring to the *New Zealand Shipping case*, said:

E

> In the course of the speeches, which are not entirely consistent with one another, reference was made by all their Lordships to the well-known rule of construction that, except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely on his own breaches of his primary obligations as bringing the F contract to an end, ie as terminating any further primary obligations on his part then remaining unperformed. This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely on an event brought about by his own breach of contract as having terminated a contract by frustration, is often expressed in broad language as 'A man cannot be permitted to take advantage of his own wrong'.

G Counsel for the appellants submitted that the *New Zealand Shipping case* and all the other relevant authorities were concerned with questions involving avoidance of a contract and they had no application to a case such as this where the continuance of the contract was involved. There was, he said, a fundamental difference between a provision which allowed the party to rely on his own wrong to avoid a contract and a provision which entitled him to enjoy a contractual benefit because of his wrong. I do not consider that this argument is H sound. Although the authorities to which I have already referred involve cases of avoidance, the clear theme running through them all was that no man can take advantage of his own wrong. There was nothing in any of them to suggest that the foregoing proposition was limited to cases where the parties in breach were seeking to avoid the contract and I can see no reason for so limiting it. A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is I a party who relies on his breach to avoid a contract and thereby escape his obligations.

[54] The passage just referred to suggests that the rule contained therein is confined to the prohibition of a person taking advantage of his own breach or wrong. That is the position in English law. On the facts of this case it cannot be said that the fact

of IGB becoming the majority shareholder in the defendant is a breach or wrong. It is a perfectly lawful exercise. However, that is not so in the case of Malaysian law. The relevant words in s 40, that is to say, ' … disabled himself from performing his promise … ' do not subject the rule to such a qualification. The words are wide enough to include any act on the part of a party which has the effect of bringing the contract to an end. There can be no dispute that the defendant terminated the services of the plaintiff because its new majority shareholder wanted to appoint its own architect. The use of the new plans resulting in the project being aborted, even if considered to be a reason, is on the same footing. This state of affairs was brought about by the act of the defendant itself thereby disabling it from performing its part of the agreement. The defendant cannot disable itself from performing a contract brought about by its own acts. The reason for the termination of the services of the plaintiff by the defendant is thus not valid. There is therefore a constructive breach of contract by the defendant. What now remains to be considered is the measure of damages to which the plaintiff is entitled.

[55] Where a party by his own act makes it impossible for him to perform his contract at the due date, there is a constructive breach of contract, and the other party is entitled forthwith to enforce his rights as on a breach (see *Synge v Synge* (1894) 1 QB 466; *Saranpet v Punno* (1931) 134 IC 779). The measure of damages following a breach of contract is governed by s 74 of the Contracts Act 1950 ('s 74') which reads as follows:

(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract

[56] It must be observed that the section uses the word 'compensation' and not 'damage'. The *Indian Contract and Specific Relief Acts* by Pollock & Mulla (11th Ed) Vol II in commenting on s 73 of the Indian Contract Act (equivalent to our s 74) says at p 802:

> The general principle for the assessment of damages is compensatory, ie the innocent party is to be placed, so far as money can do, in the same position as if the contract had been performed.

[57] In explaining the distinction between 'compensation' and 'damages' Mookerjee J said in *Mahamed Mozaharal Ahmad v Mahamed Azimaddin Bhuinya* AIR 1923 Cal 507 at pp 511–512:

> As Lord Esher observed in *Dixon v Calcraft* (64) the expression compensation is not ordinarily used as an equivalent to damages, although as remarked by Fry, LJ in *Skinner's Co v Knight* (65) compensation may often have to be measured by the same rule as damages in an action for the breach. The term compensation as pointed out in the *Oxford Dictionary*, signifies that which is given in recompense, an equivalent rendered. Damages, on the other hand; constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained; the value estimated in money, of something lost or withheld. The term compensation etymologically suggest the image of balancing one thing against another; its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent.

The word 'compensation' therefore refers to an award made which is equivalent to what has been lost.

[58] In *Toeh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39 it was held that s 74 is the statutory enunciation of the rule in *Hadley v Baxendale* (1854) 9 Exch 341. The principle underlying the award of damages is that where a party sustains a loss by reason of a breach of contract, he is, as far as money can do it, to be placed in the same position with respect to damages, as if the contract had been performed. In *Houweling Nurseries v Governor and Company of Adventures of England Trading Into Hudson's Bay* (1984) 13 DLR (4th) 93 (BCCA) it was observed that in some cases the exercise will be analogous to that of assessing damages for future losses arising from a tortious act. Subrahmanyan & Singhal in their book entitled *Indian Contract Act* (3rd Ed) Vol 2, in dealing with the basic principles of awarding compensation under the section, said at pp 144–145:

> Two important principles, governing the grant of damages, are —
>
> (1) that the claimant should not himself be guilty of any negligence or other improper conduct, and should have taken all the reasonable steps to minimise the loss to be suffered by him; and
>
> (2) that the amount of damages to be awarded should never exceed the loss actually suffered by him (the claimant), or, which he is likely to suffer, provided that his acts are lawful, just, reasonable and not contrary to the law, rules or bye-laws duly enacted.
>
> These principles can be easily explained by considering the instances, where a person can have a legal right to sue for damages. For example, if A had made a contract with B for the supply of fuel-wood for running a brick-kiln and B fails to carry out the contract, it will not be open to A to close the brick-kiln and to claim damages to the extent of the profits which he could derive from the business, if the fuel-wood had been supplied. He must carry on the business by purchasing fuel-wood, or a similar fuel from the market at a reasonable rate, that is, at the market price, and claim the difference between the market price and contractual price as damages from B. But, if no such fuel was available, he will, of course, have to close the business, and, in these exceptional circumstances, he can claim damages to the extent of all kinds of losses suffered by him.

[59] In commenting on the measure of damages where there is a breach of contract by the employer in a building contract Subrahmanyan & Singhal say in their book entitled *Indian Contract Act* (3rd Ed) Vol 2 at p 264:

> Where the owner himself breaks the contract, before any work has been done, the measure of damages is the agreed amount less the cost of building, or repairs or improvements. But a

breach of contract after the work has begun presents difficulties. The ordinary measure of damages is that part of the contracted amount which remains unpaid less the estimated cost of completing the job; or the Court may award —

(a) the expected profits on the entire contract plus the cost of the work actually performed; or

(b) such proportion of the contracted amount as the cost of work done bears to total cost, plus any profit which would have been made on the work remaining to be done. The amount of recovery will depend upon the facts and circumstances of every case.

In *Birendra Nath Dhar v Food Corporation of India* AIR 1978 Cal 362 there was a breach of a contract for a specified period for the provision of services. It was held that the plaintiff was entitled to damages for the unexpired period. In *Brij Paul Singh v State of Gujarat* AIR 1984 SC 1703 where there was a breach of a work contract it was held that the contractor was entitled to claim damages on the basis of expected profits on the balance of the contract.

[60] As the breach of the agreement is not in respect of a cause enumerated in cl 3 the damages must be assessed in accordance with s 74. The agreement is for the entire project. The fees payable for the various stages have been fixed and were therefore foreseeable at the time the parties entered into the agreement. The assessment of damages in this case must proceed on the basis that the agreement between the parties had been performed, that is to say, the plaintiff is entitled to damages for the unexpired period of the agreement. It was on that basis that the learned trial judge correctly proceeded and made an award in the sum of RM7,705,382 with interest at the rate of 4% per annum from 1 November 1988.

[61] In the upshot I would allow the appeal with costs.

Abdul Aziz Mohamad FCJ:

[62] This appeal involves references to certain provisions of the Architects Act 1967 ('the Act') and the Architects Rules 1973 made thereunder ('the Rules') and certain guidelines and a resolution of the Board of Architects, also known as the Lembaga Akitek Malaysia ('LAM'). I think that it is convenient to begin my judgment by setting out these matters. What I am going to say about the Act is based on the text of it in the respondent's bundle of authorities, which is not of what the Act is today but appears to be of what was in force before 19 February 1988, the date of the coming into force of the first of several sets of amendments that made the Act what it is today.

[63] The Act, according to its long title, is an Act 'to provide for the registration of architects and matters connected therewith'. It also provides for the registration of building draughtsmen. It prohibits a person from doing certain things unless he is registered under it. It deals mainly with matters relating to registration, cancellation of registration and reinstatement. The governing authority over the matters dealt with by the Act is LAM, which is established by the Act. Its functions are listed in s 4. Among these are, under para (e), 'to hear and determine disputes relating to professional conduct or ethics of Architects … and to appoint a committee or arbitrator or arbitrators to hear and determine such disputes', under para (f),

'to determine and regulate the conduct and ethics of the architectural profession …', and, under para (k), 'generally, to do all such acts, matters and things as are necessary to carry out the provisions of this Act'.

[64] The Pertubuhan Akitek-Akitek Malaysia ('PAM') is also involved in the Act. Membership of it, though not in all cases, is a qualification for registration under the Act. It is not a body established under the Act. As its name implies, it is an association or society. By a resolution which bears the date 2 December 1980, LAM in collaboration with PAM established a committee called 'The Joint LAM/PAM Practice Committee' ('the Practice Committee'), which is charged with the responsibility for dealing, under paras (e), (f) and (k) of s 4 of the Act, with all matters pertaining to the professional conduct and practice of registered persons who are also members of PAM, where complaints or disputes have been referred to either of the two bodies. Subject to ratification by LAM, findings and actions of the Joint Committee are to be deemed, according to the resolution, to be those of LAM.

[65] Section 35 of the Act empowers LAM, with the approval of the Minister, to make rules to prescribe anything which may be prescribed or is required to be prescribed under the Act and to enable LAM to perform any of its functions. Pursuant to that power the Architects Rules 1973 were made. The Rules were subsequently amended by the Architects (Amendment) Rules 1986 ('the 1986 amendment'), which were published on 2 October 1986, but the appointment of the date of their coming into force was not published until 1 June 1989, when they were brought into force retrospectively to 21 August 1986, the date of the Minister's approval and a date that was even earlier than the date of their publication. The position would therefore be that although from 2 October 1986 the 1986 amendment was in published existence, anyone looking at any time between that date and 1 June 1989 at the state of the legislation would have regarded the original provisions of the Rules as the provisions that were in force. It is only a person who on or after 1 June 1989 looked at the state of the legislation who would have seen that the amended provisions had already come into force on 21 August 1986.

[66] Rule 27 of the Rules, which was not affected by the 1986 amendment, provides as follows:

> 27. A person registered under the Act shall, in the exercise of his profession, observe and be guided by such of the provisions of the Code of Professional Conduct in the Third Schedule as are applicable to him.

[67] The 1986 amendment completely replaced the Third Schedule with a new Code of Professional Conduct. Code 3(8) of that Code provides as follows:

> 3 (8). An Architect on being approached or instructed to proceed with professional work for which he knows or can ascertain by making reasonable enquiries that another Architect has been engaged shall, before proceeding with such work, communicate in writing with that Architect and obtain a letter of release from him or obtain such letter through his prospective client.

[68] There was no such provision in the original Third Schedule.

[69] Rule 28 of the Rules originally provided as follows:

> 28. Except with the prior agreement of the Board given for special reasons, an Architect … shall only enter into an engagement for his professional services upon the conditions in the Fourth Schedule.

[70] Paragraph 7 of the original Fourth Schedule provided as follows:

> 7. An engagement entered into between an Architect … and a client may be terminated at any time by either party upon reasonable notice being given.

[71] By the 1986 amendment r 28 was replaced by a new r 28, of which para (1) provides as follows:

> 28. (1) Except with the prior approval of the Board given for special reasons, an Architect shall only enter into an agreement for his professional services according to the Architects (Scale of Minimum Fees) Rules 1986, the Conditions of Engagement in the Fourth Schedule and the Memorandum of Agreement in the Fifth Schedule.

[72] The 1986 amendment also completely replaced the Conditions of Engagement in the Fourth Schedule. Paragraphs 16, 17, 18 and 21 of the new Conditions of Engagement provide as follows:

> 16. The agreement between the Architect and the client may be terminated at any time by either party giving to the other party sixty (60) days' notice or such shorter period of notice as may be agreed upon by the Architect and the client.
>
> 17. The Architect shall submit his accounts to the client for the balance of fees due together with any other outstanding claims for reimbursable charges not later than 30 days from the date of expiry of the notice of termination of the agreement.
>
> 18. In the event that the agreement between the Architect and the client is terminated for a reason not due to the fault of either party, the client shall, subject to the rights of either party in respect of antecedent breaches of the agreement between the two parties, pay to the Architect the balance of fees together with all reimbursable charges due to the Architect, after which the Architect shall issue a letter of release to the client and the client shall be entitled to appoint another Architect to continue with the project.
>
> 21. In the event of any dispute between the Architect and the client, whether arising during or after the rendering of the services under the agreement, either party shall give notice in writing to the other party informing him of the matter in dispute and requiring its settlement. The parties shall then appoint an Arbitrator but if they fail to do so within 14 days of the date of the notice, either party may submit a written request to the President of the Board of Architects to appoint a person to serve as an Arbitrator, whose award shall be final and binding on both the Architect and the client.

[73] The Memorandum of Agreement in the Fifth Schedule, which was introduced by the 1986 amendment, and according to which an architect is required by r 28 to enter into an agreement for his professional services, adopts the Conditions of

Engagement as part of the agreement. It is a standard form of agreement containing five paragraphs of agreement, the first three being as follows:

(1) The client hereby appoints the Architect to provide the professional architectural services for the Project subject to and in accordance with the Conditions of Engagement as prescribed in the Rules and the Architect hereby accepts the appointment for the purpose of providing the professional services for the same subject to and in accordance with the Conditions of Engagement.

(2) This Memorandum of Agreement, the Conditions of Engagement of the Architects (Scale of Minimum Fees) Rules 1986 shall together constitute the Agreement between the client and the Architect.

(3) In consideration of the Architect providing the professional services required, the client hereby agrees to pay the Architect in accordance with the Architects (Scale of Minimum Fees) Rules 1986.

[74] On 10 December 1988 LAM issued General Circular No. 6/1988 entitled Guidelines for Letters of Release ('GC 6/88') to replace certain earlier circulars. It deems failure to comply with it to be an infringement of the Code of Professional Conduct. It sets out in paragraph 1.1 the provisions of Code 3(8) of the new Code of Professional Conduct, which was then in existence but had not yet been brought into force. Code 3(8) is about the need for a letter of release by an existing architect (the first architect) to enable another architect to take over his engagement. The purpose of GC 6/88 apparently is to lay down guidelines for the implementation of Code 3(8). Paragraph 18 of the Conditions of Engagement does provide for the issuance by an architect of a letter of release to his client, but I see no indication in GC 6/88 that it was prepared with para 18 also in mind.

[75] Paragraphs 1.2 to 1.5 of GC 6/88 set out the steps for obtaining a letter of release. They provide as follows:

1.2 The Architect shall be required to take the initiative to write to the first Architect to enquire if his services have been properly terminated and all outstanding fees settled. If this has been completed, the first Architect shall be obliged to issue a letter of release to enable the second Architect to accept the commission.

1.3 The first Architect upon receipt of the enquiry from the second Architect shall ensure that a reply shall be given promptly and in any case within seven (7) days of the date of receipt of the second Architect's letter. The first Architect shall not unreasonably withhold the issuance of the letter of release.

1.4 In the event the first Architect claims that there are outstanding fees due to him, the procedure described hereunder shall be followed:

(a) To reply to the enquiry within seven (7) days of receipt of the letter and to advise the second Architect of the position.

(b) To ensure that his claims are both bona fide as well as legally valid and that he has complied with all the provisions of the Code of Professional Conduct prescribed by the Board.

(c) Upon receiving notice of termination of his engagement from his Client, he shall, as expeditiously as possible, present his account for professional services rendered, but in no case shall it be longer than one month.

(d) In the event that the Client disputes the Architect's claim for fees and which remains unresolved after a period of fourteen (14) days of the date when the Architect first submitted his account, the dispute may be submitted to the Board for resolution through either adjudication in accordance with the Rules of Adjudication of the Board or arbitration in accordance with the Arbitration Act 1952.

(e) Upon the submission of the dispute to the Board for either adjudication or arbitration and the compliance by the Client of the Board's directions in the matter, the first Architect shall issue the letter of release within the time specified by the Board. In the event the first Architect either fails or refuses to issue such letter of release, the Board shall intercede and at its sole discretion waive the requirement for such letter of release.

In the event a reply is not received by the second Architect within the time limit provided in paragraph 1.3 above, the matter may be referred to the Board who shall have the sole discretion of waiving the necessity for a letter of release.

[76] Paragraph 2 of GC 6/88 sets out three 'circumstances when a letter of release shall be deemed to be necessary', presumably necessary as required by Code 3(8). The third circumstance is as follows:

(c) Where the engagement of the first Architect has been terminated by his client being the owner of the same site and for the same project irrespective of any consequential action following the termination and settlement of the Architect's outstanding fees may be the subject of either litigation or arbitration and where such action was initiated by the first Architect's client.

[77] The provision is difficult to understand because of some defect in its construction. But it probably means that a letter of release is necessary even though, after the termination of the engagement and with the settlement of the outstanding fees, there still remains a claim by the client in court or in arbitration.

[78] So much for the statutory and related provisions. I now turn to the facts.

[79] The parties will be referred to as in the High Court, that is to say, the appellant, Akitek Tenggara Sdn Bhd, as the plaintiff, and the respondent, Mid Valley City Sdn Bhd, formerly known as Bandar Incorporated Development Sdn Bhd, as the defendant.

[80] This case is related to the development of five lots of land in Kuala Lumpur (Kampung Haji Abdullah Hukum), and some State land, into a township as a joint venture between the defendant, the owner of the lots, and the Dewan Bandaraya Kuala Lumpur ('DBKL'), for which a joint-venture agreement was entered into on 1 March 1984. The project was at that time called the Bandar Syed Putra Project and later renamed the Mid Valley Project. It would appear from the statement of defence that originally one of the five lots was owned by Lim Pak Tow & Sons Realty Sdn Bhd ('LPTSB'), that the idea of the township came about when that company was owner of this land, and that to realize the idea LPTSB bought the four other lots, and the defendant company was formed in 1983 and became the owner of the five lots.

[81] The plaintiff had been approached by LPTSB, acting through a director of theirs, Mr. Lim Pak Tow, for its services in connection with the development of the lands. A series of correspondence between LPTSB and, later, the defendant, on the one hand, and the plaintiff, on the other, culminated in a letter from the plaintiff to the defendant dated 6 April 1984, for the attention of Mr. Lim Pak Tow, thanking the defendant for the plaintiff's appointment as the defendant's architect for 'the above project', described as a 'proposed comprehensive development', and asking the defendant to confirm the terms of the plaintiff's appointment that were set out in the letter. This the defendant did on 14 June 1984. I shall refer to the letter of 6 April 1984 as 'the appointment letter'.

[82] The terms in the appointment letter are as follows:

1. Fees

Our fees shall be 4% of total building cost for the 1st block and 2% of total building cost for the subsequent repetitive blocks. Over and above, we shall also be paid 1% of the total infrastructure cost. However, the fee for residential units for Dewan Bandaraya shall be lump sum, that is $300 per unit for medium low and low cost and $600 per unit for medium cost flats as stipulated in your letter dated 5 January 1984.

The fee will be initially computed on estimates of building and infrastructure cost and to be adjusted according to final account on completion of project or part of project by phases.

2. Mode of Payment

The mode of payment to us shall be as agreed:

1 A monthly sum of $20,000 as part of the fees for the initial stage to the completion of schematic design phase to enable the engineers to commence their structural design work. Total to be paid – 10%;

2 Design Development Phase – 10%;

3 Contract Document Phase – 10%;

4 Contract Management Phase will be spread over in equated over the contract management period. – 60%;

5 On completion of the whole building and obtaining Certificate of Fitness – 10%.

3. Abortion/Abandonment/Delay

If the project is aborted, abandoned or delayed indefinitely, the fees computed to the nearest stage of work is payable.

[83] It appears from paragraph 1 that the plaintiff's fees were based on the entire project, that is, a certain percentage of the total building cost for each block, a certain percentage of the total infrastructure cost, and, where residential units for DBKL were concerned, a certain sum per unit. The total amount of fees that the plaintiff would earn could thus be determined at any time, initially, where building and infrastructure costs were concerned, on estimates, and, when the project was completed and the final account established the actual costs, adjustments would be made to the total amount of the plaintiff's fees.

[84] The payment of that total amount (or adjustable total amount) was, however, according to para 2, to be made in stages, a certain percentage to be paid at each stage of the plaintiff's work until the whole amount was paid upon the development receiving a certificate of fitness. But this was merely the mode of payment of the total amount of fees and was not intended as an indication of an employment by stages.

[85] It is clear to me, therefore, that the plaintiff was appointed to render its services to the entire project until its completion.

[86] There was, however, para 3, which would disentitle the plaintiff to the total amount of fee computed in accordance with para 1. According to the paragraph, if the project was aborted, abandoned or delayed indefinitely, only the fees computed to the nearest stage of work would be payable. There was also in force para 7 of the original Fourth Schedule to the Rules.

[87] That was in 1984. Four years later, on 18 August 1988, the plaintiff sent to the defendant a computation of its fees to date, giving a figure of RM2,031,568. This figure was disputed by the defendant, who contended that the amount should be very much less. The dispute was carried out in a series of correspondence that went on until 26 October 1988, the defendant's letters being signed mostly by Mr Lim Pak Tow. In the correspondence, hints were given as to the plaintiff's future position as architect for the project. In its letter dated 23 August 1986 the defendant proposed to pay a small sum 'to settle the final account', saying that the settlement was necessary because there would be a major change in the management of the defendant company. In another letter of the same date the defendant said that it had no intention 'to proceed with the proposed development in accordance with the approved plan'. In its letter dated 5 October 1988 the defendant cited para 3 of the appointment letter and said that 'between March 1986 and this year, all work on the project was essentially at a standstill'. In its letter dated 26 October 1988 the defendant again cited the said para 3, saying that 'construction works have stopped on site since June 1986 and the project had been delayed indefinitely since June 1986'. To the question of change of management, the plaintiff's reply in its letter dated 27 August 1988 was that any changes in the management of the defendant company should not affect the plaintiff's appointment. I should mention that the Court of Appeal was to state as a fact that about 15 July 1988 IGB Corporation Berhad acquired a majority stake in the defendant company.

[88] On 1 November 1988 the defendant wrote to the plaintiff to say that it was 'desirous of discharging' the plaintiff as architect for the project. It said: 'As IGB Corporation Berhad are now the majority shareholders in our company, we reiterate that we intend to utilise the services of architects presently retained by IGB Corporation Berhad. The present design for the development will not be used'. It asked the plaintiff to let it have the plaintiff's final bill for services 'in accordance with paragraph 3' of the appointment letter. The mention of para 3 indicates that the defendant took the stand that the project was aborted, abandoned or delayed indefinitely. The stand of the plaintiff was that the attempt to discharge it was bad in law and this was conveyed to the defendant.

[89] The facts, events and matters that follow are mostly pertinent to the question of res judicata which is related to one of the issues in the present appeal. On 29 November 1988 the defendant's solicitors wrote to the plaintiff to say, inter alia, that the project had been aborted and that the defendant wished to appoint new architects 'for a new project at the same site' to enable which the plaintiff was required to let the defendant have the plaintiffs' letter of release. The plaintiff, by its solicitors, replied on 6 December 1988 that it was still the defendant's architect for the project and therefore the defendant was not entitled to the letter of release, and that the project had not been aborted. The plaintiff also objected to any attempt by the defendant to appoint new architects for the project. So on 13 December 1988 the defendant's solicitors wrote to LAM to seek its assistance in obtaining a letter of release from the plaintiff and also in arbitrating the fee dispute. The letter gave the defendant's version of the facts. In response to LAM's request for clarification, on 5 January 1989 the plaintiff gave its version of the facts and said, inter alia, that the project had not been aborted, abandoned or delayed indefinitely, that the plaintiff had been carrying out its duty diligently and that the question of a letter of release did not arise at all as the plaintiff was still legally the appointed architect.

[90] On 24 January 1989 LAM wrote to the defendant's solicitors, saying that their letter and the plaintiff's reply had been considered by the Practice Committee on 17 January 1989. LAM's letter went on to say this:

> From Akitek Tenggara's reply, a copy of which is enclosed for your study, it would appear that they had disagreed with the statement that their services have been terminated. The problem may be caused by the fact that their services have not been properly terminated. It is our opinion that your client's letter of 1 November 1988 is not a letter of termination. If your client's intention is to terminate the services of Akitek Tenggara in order to appoint another Architect, then they should write to Akitek Tenggara to clearly terminate their services.
>
> The Code of Professional Conduct and in particular the latest Board's Circular No 6/1988 on Letters of Release are very clear on the professional obligations of Architects upon termination of their professional services. In the event that there is still dispute the Board can, with the consent of the disputing parties, then appoint an arbitrator, after which the first Architect must issue the Letter of Release to enable the appointment of a second Architect.

[91] It appears from that letter that LAM (or the Practice Committee) thought that the problem that had arisen about the issue of the letter of release by the plaintiff arose because the services of the plaintiff had not been properly terminated and that was because the letter of 1 November 1988 was not clearly a letter of termination. It merely said that the defendant was 'desirous of discharging' the plaintiff. To desire to do something is not yet to do it. LAM advised the defendant that if it really intended to terminate the plaintiff's services, it should write another letter to the plaintiff to clearly terminate its services. To LAM, once there was a clear termination, the letter of release had to follow, even if there was still a dispute. LAM was obviously having in mind para 1.4 of GC 6/88, which speaks of the event of claims by the first architect, in this case the plaintiff, of 'outstanding fees due' to him. The dispute that

LAM meant would have been a dispute about 'outstanding fees due', which I understand to mean fees due and yet unpaid for work that had been done up to the time of termination.

[92] It seems to me that what LAM had in mind when it spoke of a clear or proper termination, was the ritual, that is the formality or procedure, of termination and not the justness or justice of the termination.

[93] What the defendant did after receipt of LAM's letter of 24 January 1989 was to write a letter to the plaintiff dated 26 January 1989 expressing its view 'that we have unequivocally and irrevocably terminated your services as our Architect in the abovementioned aborted project vide our letter dated 1 November 1988' and further stating 'your services are terminated' and 'we shall be appointing new Architects for the new project'. The defendant asked the plaintiff to send to it, within five days, the plaintiff's 'final bill for work done' and the letter of release. The defendant also undertook to settle the plaintiff's fees 'as may be ascertained by a forum of competent jurisdiction'.

[94] The plaintiff responded through its solicitors' letter dated 31 January 1989. It maintained that the defendant was not entitled to a letter of release because it was still the defendant's architect. It took this stand because it regarded the defendant's letter of 1 November 1988 as not a termination letter and the defendant's letter of 26 January 1989 as improper, invalid and of no effect. It also said that the defendant had no right to terminate its services without just cause. It seems to me that the plaintiff was thinking both of the ritual and the justice of termination.

[95] As the defendant's need for the letter of release was still not resolved, LAM arranged a meeting, which was held on 23 February 1989 and at which the parties were separately interviewed by the Chairman of the Practice Committee, Dato' Kington Loo, and the President of LAM, Mr Tan Eng Keong, who was a member of the Practice Committee. These two gentlemen signed a summary of decisions in several paragraphs, dated 24 February 1989. According to para 2.1, the plaintiff accepted the right of the defendant to terminate the plaintiff's appointment without assigning any reason and irrespective of 'the form and language used' in the correspondence between them, and accepted that notice of termination had in fact been given. According to para 2.2, the plaintiff was to submit its final account for services rendered not later than thirty days from 23 February 1989, the date of the interviews. According to para 2.3, if the quantum was unacceptable to the defendant, a dispute shall be deemed to have arisen and the parties 'will agree to submit' it to arbitration. The thirty days in para 2.2 could have been in reference to either para 1.4 c of GC 6/88 or para 17 of the new Conditions of Engagement, which were yet to be brought into force. The decision as to submission of dispute to arbitration in para 2.3 could have been made with either para 1.4 d of GC 6/88 or paragraph 21 of the new Conditions of Engagement in mind. According to paragraph 2.4, in the event of a dispute being submitted for arbitration, the plaintiff was to issue the letter of release upon the provision of a banker's guarantee in the sum of RM2m. This could have been decided with paragraph 1.4 e of GC 1/88 in mind.

[96] On 7 March 1989 the plaintiff's solicitors wrote to LAM saying that the plaintiff objected to the contents of the summary of decisions. In particular the plaintiff denied accepting, as stated in para h 2.1 of the summary of decisions, the defendant's right to terminate its appointment and maintained that the defendant had not terminated its appointment.

[97] According to the Practice Committee, that letter and all pertinent documents were reviewed at a meeting of the Practice Committee on 14 March 1989. The Practice Committee decided to waive the requirement for a letter of release from the plaintiff, and so the defendant was at liberty to appoint another architect and the other architect was at liberty to accept the appointment. The reasons for the waiver decision were as follows. First and foremost, it was decided: 'That there is no question that [the defendant] has the right to terminate the services of [the plaintiff] and to be able to do so with or without assigning any reason'. To the Practice Committee the defendant's letter of 26 January 1989 'left no doubt over the intent of' the defendant's earlier letter of 1 November 1988, meaning, I take it, no doubt that the letter of 1 November 1988 was a termination letter. The plaintiff should have submitted its accounts for the balance of fees due within thirty days of the termination as required by para 17 of the Conditions of Engagement, irrespective of whether the quantum was disputed, because in the event of a dispute the arbitration provisions of para 21 of the Conditions of Engagement would apply, but the plaintiff had not done that and the time for doing it was well past. If the plaintiff had done that, the letter of release would have been issued already. The decision of the Practice Committee, and the reasons for it that I have rendered mostly in my own way, were conveyed to the plaintiff's solicitors by the Practice Committee's letter dated 15 March 1989.

[98] It was essentially a decision to waive the letter of release requirement but made on the basis that the defendant had the 'right to terminate' the services of the plaintiff and that the services of the plaintiff had been terminated. In making the waiver decision, the Practice Committee was exercising the discretion given to LAM by the last sentence of para 1.4 e of GC 6/88. Although the circumstances requiring the exercise of the discretion, as set out in that paragraph, had not arisen, the Practice Committee probably felt justified in making the waiver decision upon consideration that, as the plaintiff was insistent that there had been no termination, the circumstances in para 1.4 e would never arise and the plaintiff would never issue the letter of release. Apropos of what I said earlier about the summary of decisions dated 24 February 1989, it is pertinent to note that in this letter of the Practice Committee dated 15 March 1989 para s 17 and 21 of the Conditions of Engagement were cited for the thirty days and the arbitration, and not para s 1.4 c and 1.4 d of GC 6/88.

[99] On 22 March 1989 the plaintiff's solicitors wrote to LAM to say, inter alia, that the decision of the Practice Committee of 14 March 1989 was invalid. This was followed by another letter dated 28 March 1989 in which the plaintiff's solicitors said that the Practice Committee had failed to direct its mind to the issues that should have been considered, namely, those of termination and of damages for breach of contract. As to termination, the plaintiff's solicitors maintained that it was an unlawful termination in breach of the Rules because there had been no notice of

termination, the defendant's letter of 1 November 1988 or 26 January 1989 not being a notice of termination, whereas the contract of engagement (in the appointment letter), having no provision for termination, could only be terminated upon reasonable notice, which, considering para 16 of the new Conditions of Engagement (which were in existence but yet to be brought into force), should be a notice of sixty days. As to damages, the plaintiff's solicitors said that what was involved was not only the question of balance of fees, but also damages for breach of contract that the unlawful termination entailed. The mention of reasonable notice must have been in reference to para 7 of the original Conditions of Engagement, which were then still in force. The plaintiff's solicitors went on to say that the plaintiff would not be averse to issuing the letter of release if its interest in possible damages for breach of contract was safeguarded. 'As we see it,' they said, 'the decisions of the Committee will create a very dangerous precedent and will open the way to employers terminating contracts of engagement without proper and just cause and with impunity'. The purpose of the letter was to urge that the Practice Committee's decision be reviewed so that the plaintiff would not have to challenge it in court. In support of that request the plaintiff's solicitors also annexed a letter of the plaintiff itself dated 25 March 1989 setting out its additional views and representations.

[100] It is plain that at that stage the plaintiff regarded the original Conditions of Engagement, particularly para 7 thereof, as applicable to the contract. While it might appear that to the plaintiff if there had been a proper notice of termination with a reasonable period of notice — if, that is, the proper rituals of termination had been observed — the termination would not have been a breach of contract entitling it to damages, it will be observed that there was also mention, in the words that I have quoted, of termination 'without proper and just cause', which serves as an indication that to the plaintiff or its solicitors there would still be a breach of contract if the termination was unjust even though ritually correct.

[101] LAM gave a comprehensive reply in its letter to the plaintiff's solicitors dated 3 April 1989. A few matters only from that letter need be mentioned. The decision of the Practice Committee had been endorsed by LAM. Among the responses to the plaintiff's own letter, LAM said that the plaintiff had refused to accept the defendant's right to terminate its appointment and had confused 'this basic right' with its claim for fees and damages 'as this can be decided by the appropriate forum'. Among its responses to the letter of the plaintiff's solicitors, LAM explained the Practice Committee's decision to treat the defendant's letter of 1 November 1988 as a letter of termination although LAM had said in its letter of 24 January 1989 that the letter was not a letter of termination. The explanation, to my understanding, was that the Practice Committee, considering that the letter of 1 November 1988 asked the plaintiff to submit its final bill for services rendered, and seeing that the defendant had affirmed by its letter of 26 January 1989 that the letter of 1 November 1988 was a termination letter, was satisfied that it was the clear intent of the letter of 1 November 1988 to be a letter of termination. LAM went on to say: 'Regarding your contention that the termination of ATSB was wrongful, this is a matter for resolution as a separate issue and the appropriate compensation awarded should you succeed in substantiating it'.

[102] It is clear from those matters in LAM's letter that the Practice Committee and LAM were not concerned with the question whether the termination of the plaintiff's services was a 'wrongful' one entitling the plaintiff to damages or compensation for breach of contract, that is to say, they were not concerned with the justice of the termination. They were concerned only to satisfy themselves that the defendant had in fact terminated the plaintiff's services, which to them the defendant had the 'basic right' to do. To the Practice Committee and LAM, a client has the basic right not to want to continue retaining the services of his architect and cannot be compelled to continue the relationship if it is no longer desired. A termination ends the relationship; whether or not the termination of the relationship is wrongful is a separate question. If the termination is wrongful, then damages would ensue. That is what the Practice Committee must have meant when it said in its letter of 15 March 1989 that there was no question that the defendant had the right to terminate the plaintiff's services with or without giving any reason.

[103] By a notice of motion dated 10 June 1989, the plaintiff sought against LAM (as first respondent) and the defendant (as second respondent) an order of certiorari to quash LAM's decision made on its behalf by the Practice Committee on 14 March 1989. I suppose it was treated as LAM's decision because of the deeming in the resolution of 2 December 1980 and because LAM had endorsed it. The application was made on several grounds set out in the supporting statement. As far as the present appeal is concerned, the crucial ground was that the Practice Committee was wrong in holding that the plaintiff's engagement had been validly terminated, it having been a wrongful termination because made without proper notice as required by the Rules. As to this, it will be recalled that the Practice Committee's decision of 14 March 1989 did not say that the engagement had been validly terminated. Because the engagement had not been validly terminated, so the supporting statement appears to say, there was no requirement to submit an account under para 17 of the Conditions of Engagement, there was no requirement to issue a letter of release, and LAM's power to waive the need for a letter of release did not arise.

[104] In para 10 of his affidavit dated 11 September 1989 for the certiorari action, Dato' Kington Loo, the Chairman of the Practice Committee, said this:

> 10. The Applicant's claim, even if the termination is wrongful, is for fees for work done and damages. However, the Applicant has to date not taken any step at all towards this end but has content to wilfully refusing [sic] to issue a Letter of Release, thereby holding up a massive project and without doubt at great cost.

[105] My understanding of that paragraph is this. There had been termination. Whether or not it was wrongful, the plaintiff ought to have issued the letter of release. If it was wrongful, it was a matter of fees and damages, which were the plaintiffs' real concern, but it was for it to take steps to recover them. The paragraph further indicates the Practice Committee or LAM's stand that the decision that there had been a termination was a decision as to the actuality of termination and not as to the validity of the termination.

[106] Such was in fact the defendant's own stand in the certiorari action. In paragraph 6 of their director's affidavit dated 13 September 1989, he said:

> 6. I am advised by the 1st Respondent's solicitors and verily believe that the Applicant herein has missed the issue at hand. The need for a Letter of Release arises from the fact of the termination of the Applicant's services. In this context the rightfulness or wrongness of such termination was and remains irrelevant.

[107] It was a recognition that the Practice Committee's decision as to termination was a decision as to the actuality of termination and not as to the validity of the termination. To the defendant, it was not necessary that the termination be a valid termination for the obligation to issue a letter of release to arise.

[108] The High Court on 31 July 1990 granted certiorari. The learned judge, Eusoff Chin J (as he then was) found that LAM had made a decision outside its jurisdiction for two reasons. First, LAM had no power to waive the need for a letter of release as this was not provided for in the Rules. Secondly, the plaintiff was not obliged to issue a letter of release because, according to paragraph 18 of the Conditions of Engagement, the issuance of a letter of release depended on there having been a termination, whereas there had been no termination because para 16 of the Conditions of Engagement required a sixty days' notice of termination which was not given by the defendant's letters of 1 November 1988 and 26 January 1989.

[109] LAM appealed to the then Supreme Court. Although it also lost in the High Court, the defendant did not appeal, so that the appeal in the Supreme Court was only between LAM and the plaintiff. In ground (e) of its memorandum of appeal, LAM said that the learned judge erred in fact in failing to appreciate that LAM did not decide on the issue of the validity of the termination of the defendant's services. It can therefore be seen that at the Supreme Court LAM continued to maintain the stand that it had consistently been taking that its decision was that there had been a termination in fact and not that the termination was valid.

[110] On 12 November 1990 the Supreme Court allowed LAM's appeal and set aside the orders of the High Court. Therefore LAM's decision to waive the need for the letter of release stood. What is available by way of the Supreme Court's grounds is only to be found at the end of the notes of proceedings of Abdul Hamid LP. Apparently there were two issues before the Supreme Court: LAM's acting in access of jurisdiction and LAM's acting contrary to the rules of natural justice. The Supreme Court found that LAM had not acted in excess of jurisdiction. As for the question of natural justice — the facts as to which I have not set out as they are not relevant to the instant appeal — the Supreme Court found that it was a subsidiary question which did not have to be answered because if the learned judge had appreciated that LAM had not acted in excess of jurisdiction, the judge in all probability would not have granted certiorari.

[111] The present appeal has its origin in an action brought by the plaintiff in October 1991 against the defendant and IGB Corporation Berhad to recover loss and damages for unlawful termination of the contract of appointment of the plaintiff as

A architect for the project. Although para 9 of the amended statement of claim averred that the contract was made partly in writing, partly orally and partly by conduct, it would appear that through all stages of the litigation both parties treated the contract to be in the appointment letter dated 6 April 1984. The essence of the plaintiff's case was set out in para 10 of the amended statement of claim in the following terms:

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> 10. The Plaintiff contends and will contend that the agreement does not contain an express term that the agreement may be terminated or for the consequences thereof. The Plaintiff shall further contend and will contend that the agreement may only be terminated either in the event of there being a breach of the express or implied terms of the agreement and for just cause. The agreement cannot be terminated for any other reason and if terminated, the party purporting to exercise its right to terminate the agreement will do so in breach thereon [sic] and will be liable to pay damages.

C

[112] The plaintiff's case in effect was that the termination of the contract by the defendant's letters dated 1 November 1988 and 26 January 1989 was an unlawful termination in breach of contract.

D

[113] In the amended statement of claim the plaintiff claimed RM2,031,568 as professional fees and disbursements due, which was the amount of the plaintiff's computation dated 18 August 1988, and loss of profit of professional fees on the project. In paragraph 14 there was an alternative claim for payment of a reasonable charge for work done, for the computation of which the plaintiff relied on PAM's recommended scale of fees for computing a reasonable charge for work 'in the event of termination as the custom or practice of the trade'.

E

[114] The defendant raised three defences in its statement of defence. In paragraph 8 it averred, firstly, that the right to terminate 'is implied by law' and, secondly, that it could be inferred from the appointment letter that the plaintiff's services may be terminated if the project was aborted, abandoned or delayed. This was a reliance on para 3 of the appointment letter. In para 10 the defendant raised the defence of res judicata, contending that the decision of the Supreme Court in the certiorari action that LAM's waiver of the requirement for a letter of release was correct in law implied that the plaintiff's services 'is terminable and the termination thereof was correctly made' and that therefore 'the issue as to the propriety of the termination … may not be raised anymore'. The defendant counterclaimed a sum of RM131,636.31, being an alleged overpayment for work done. This sum was revised during the trial to RM121,677.20.

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[115] In its reply, the plaintiff contended, as to the defence of res judicata, that the proceedings in the Supreme Court were concerned with the validity of LAM's decision about the letter of release and that the Supreme Court did not rule on the validity or otherwise of the termination of the plaintiff's services. As to the defence that relied on para 3 of the appointment letter, the plaintiff contended that the project had not been aborted, abandoned or delayed indefinitely.

I

[116] Before the trial commenced, the claim against IGB Corporation Berhad, whose name somehow appears as IGB Corporation Sdn Bhd on the covers of the

bundles before us, was withdrawn and struck out. On the first day of the trial, 16 April 1997, the plaintiff was allowed to amend its amended statement of claim. The amendments were to specify a sum of RM7,705,382 as loss and damages for breach of contract, to abandon the claim of RM2,031,568 for professional fees and disbursements due, and to specify a sum of RM2,006,373 for the alternative claim in para 14. Particulars were given to show how the sum of RM7,705,382 was arrived at. The particulars were in accordance with the rates of fees agreed on in para 1 of the appointment letter. A sum of RM9,476,688 was arrived at as the amount that the plaintiff would have been entitled to had it given its services until the project was completed. As its services were prematurely terminated, a deduction of RM1,141,306 was made, which represented the architectural cost that the plaintiff had not incurred, or had saved, because it did not give its full services. There was also a deduction of RM630,000, being amount paid. Those deductions produced the sum of RM7,705,382. The alternative sum of RM2,006,373 for work actually done, for which particulars were also given, was also arrived at after deducting the payment of RM630,000.

[117] In his written submission in the High Court, the plaintiff's counsel developed the plaintiff's case along the lines of the reamended statement of claim and reply. As to the defence of res judicata, the plaintiff's counsel submitted that it had been abandoned because it had not been seriously pursued during the trial.

[118] In his written submission in reply the defendant's counsel did not submit on the defence of res judicata or deny that the defence had been abandoned. As to the other two defences, he submitted, firstly, that the letter of 1 November 1998 effected a valid termination as it was based on para 3 of the appointment letter and there was evidence that the project had been abandoned, aborted or delayed indefinitely. Secondly, as regards the defence that the right to terminate was implied by law, he advanced reasons for contending that there ought to be implied, as a term of the contract, Clause 1.4.1 of PAM's Conditions of Engagement, which states:

> An engagement entered into between a Client and the Architect may be terminated at any time by either party on the expiry of reasonable notice'. It should be noted that the term that was contended to be an implied term was not paragraph 7 of the Conditions of Engagement in the Rules.

The High Court judgment is reported in *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd & Anor* [1999] 2 MLJ 625. The learned trial judge, Kamalanathan Ratnam J, cursorily mentioned the defence of res judicata but did not decide on it, probably because he considered that it had been abandoned or had not been seriously pursued. As to the defence of termination based on paragraph 3 of the appointment letter, the learned judge found that there was no proof that the project had been abandoned or aborted. This is what he said (from the original text):

> What is important to note however is that the letter of termination of the plaintiff's services is premised solely on the ground that IGB was at the date thereof the majority shareholder of the defendant and hence intended to utilise the architects on the panel of IGB for the said Project. I have been shown no evidence that the Project has been abandoned. I find that the defendant's contention that the said Project was abandoned was raised for the first time in the letter dated 26.1.89 from the defendant. In any case this reason is inconsistent with the reason advanced by the defendant in its letter dated

A 1.11.88 and from the evidence of DW2, the Project Manager of IGB Corporation Sdn Bhd. I also note that there has been no complaint by the defendant in respect of the services rendered by the plaintiff.

I reject the defendant's reason that IGB being the majority shareholder, intended to use its own architects on the basis that this was never envisaged or agreed to by the parties when terms were agreed upon.

B

In any case under cross-examination, DW2 clearly admitted that the JVA was not terminated but was varied. He also conceded that it was incorrect to say that the plaintiff's services were terminated because the Project was abandoned. He also confirmed that the JVA between the defendant and Dewan Bandaraya Kuala Lumpur was still ongoing.

C

It is interesting to observe that after the plaintiff was discharged as the architect of the said Project, the defendant contended that new amended layout plans and amended building plans were submitted. However, DW2 did not produce any of the alleged new amended layout plans and amended building plans or even a fresh JVA between the defendant, IGB and Dewan Bandaraya Kuala Lumpur. There was not even produced to the Court, a new development order. I therefore find that as admitted by DW2, the defendant is still continuing with development of the said Project under the existing JVA. Even if the concept of the Project had been varied (which I find is not the case) the Project nevertheless remains the same and is still ongoing.

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It is clear to me that the defendant has been labouring under an erroneous misconception that an alteration or variation of the concept of the development is synonymous with the Project being abandoned. In any case DW2 had admitted that the plaintiff's services were terminated not because the Project was aborted, but because IGB wanted to use their own architects. He who asserts, proves. The defendant has in my judgment failed to discharge the burden of proving that the Project had been abandoned or aborted.

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[119] Although in that part of his judgment the learned judge does not appear to be making a finding that the project had not been indefinitely delayed, later, when he was considering the question of damages, he said: 'I had earlier held that neither has the project been aborted, abandoned nor delayed indefinitely. This is based on the admission of DW2 himself'. It was if the reasons he had given earlier for finding no proof that the project had been abandoned or aborted also served to show that there was no proof that the project had been delayed indefinitely.

G

[120] The learned judge did not make a finding on the defence of implied right to terminate which the defendant's counsel had submitted on, using Clause 1.4.1 of PAM's Conditions of Engagement. He did, however, mention about implied right in connection with the question whether paragraph 3 of the appointment letter was a termination provision. He said:

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I also find that there is no implied right given to the defendant to terminate the plaintiff's contract if the Project is aborted, abandoned or delayed indefinitely. The term relating to this aspect merely states that if this happens the fees computed to the nearest stage of work is payable.

I

[121] The learned judge therefore found that the termination of the plaintiff's appointment was unlawful and therefore was a breach of contract. After considering

the evidence as to damages he accepted the plaintiff's particulars for the claim for RM7,705,382 and allowed the claim. He dismissed the defendant's counterclaim. In allowing the claim for damages as it had been particularized, he relied on *Thomas v Hammersmith Borough Council* [1938] 3 All ER 203and *Edwin Hill & Partners v Leakcliffe Properties Ltd* [1984] 29 BLR 4.

[122] The defendant appealed to the Court of Appeal. The memorandum of appeal dated 30 June 1999 is reducible to three points. First, the project was aborted and abandoned, with no mention of the project being delayed indefinitely. Second, the right to terminate ought to be implied if there was a change in the concept of the project. There was no mention of the defence of implied right to terminate that relied on Clause 1.4.1 of PAM's Conditions of Engagement. Third, the award of the quantum of RM7,705,382 was an error.

[123] On 1 October 2001 the Court of Appeal gave the defendant leave to amend the memorandum of appeal. One amendment was to include the res judicata point. In the paragraph for this point, the new para 2, it was stated that LAM's ruling that the Supreme Court upheld was that the plaintiff's services 'were terminable (and had been terminated)'. Another amendment was to include the question of 'delay of the original project'. The other amendments related to the question of abortion or abandonment of the project.

[124] I will highlight only two matters in the defendant's written submission in the Court of Appeal. It was submitted that para 7 of the Conditions of Engagement in the Rules provided a statutory right to terminate and that the defendant's letter dated 1 November 1988 was a notice of termination pursuant to para 7. It was an argument that para 7 applied directly by force of law to the contract so as to form a part of it. It was not in furtherance of the defence of implied right as pleaded in the statement of defence or as argued in the High Court, using PAM's Clause 1.4.1. Neither was the point included in the memorandum of appeal. It was a completely new point.

[125] In regard to para 3 of the appointment letter, the submission sought to show the existence of evidence that the project was aborted. There was no submission that the project was delayed indefinitely.

[126] The Court of Appeal decided the appeal only on the question of res judicata and upheld the defence of res judicata. It found in paragraph 21 of its judgment that the Supreme Court did determine the issue of 'validity' of the termination of the plaintiff's services. In para 22, it rejected the plaintiff's submission that the Supreme Court did not deal with the issue whether the defendant had the 'right to terminate' the plaintiff's services but dealt only with the issue of the letter of release. As to what the Court of Appeal found the Supreme Court's decision to be on the question of termination, this may be seen in para h 27, where the Court of Appeal said that the Supreme Court upheld the Practice Committee's decision in para 1 of its letter dated 15 March 1989, which was a decision that the defendant had the 'right to terminate' the plaintiff's services, and in para 36, where the Court of Appeal said that its finding was 'that the Supreme Court had determined that the appellants had the right to terminate the respondent's services with or without assigning any reason'. The Court

of Appeal therefore set aside the award of damages of RM7,705,382 for breach of contract, but allowed the claim of RM2,006,373 for work done up to the date of termination. But since, after the High Court judgment, the defendant had paid RM2 million, it was ordered to pay the balance of RM6,373 only, with interest.

[127] Leave was granted to the plaintiff to appeal to this court on two questions. The first question is: 'Is the Lembaga Akitek Malaysia competent to decide the lawfulness or otherwise of the termination of an architect by his client?'. It is a general question the answer to which, if given, will bind LAM in the exercise of its functions. It might have been thought that the answer to this question would also answer the question whether the Court of Appeal was right in holding that the Supreme Court decision in the certiorari appeal constituted res judicata which barred the plaintiff from bringing its action for damages for breach of the contract by its unlawful termination, which is a question that is specific to this case and the question that really needs to be answered to decide this appeal. The answer depends on the actual circumstances of this case. In the memorandum of appeal, the paragraph that is related to the general question is para 2, where it is stated that the Practice Committee does not have the requisite jurisdiction to decide the lawfulness of the plaintiff's termination as architect. So was it argued by the plaintiff's counsel in this appeal, but it is not clear how, even if the general question were answered in the negative, the answer would help to answer the res judicata question. If it was sought to argue – and if the plaintiff's counsel did so argue I have forgotten or overlooked it — that if there was no such jurisdiction the Supreme Court could not have decided that the Practice Committee decided that the termination was unlawful and that it had jurisdiction to so decide, that would be assuming that the view as to jurisdiction that we take today — that is if we were to take the view that LAM had no jurisdiction to decide the question — must have been the view that the Supreme Court took, whereas the Supreme Court might have taken the view that the Practice Committee did have jurisdiction to decide on the validity of the termination.

[128] The plaintiff's counsel has, however, also submitted on the question of what the Practice Committee actually decided. It is a submission that is said in para 3.6 of the plaintiff's Outline of Submission dated 21 January 2007 to be a submission 'for the sake of completeness'. Having formed a certain view of the case from the facts that I have set out, a view that I shall state shortly, the part of the plaintiff's submission that strikes me as crucial is in paras 3.12 and 3.13, where it is submitted that what LAM decided was that the defendant had a right to terminate the plaintiff's services, not that the termination was valid, and that the right to terminate and a termination being valid are two separate and distinct issues. This submission is connected with paragraph 4 of the memorandum of appeal, where it is stated that it was the defendant's own contention in the Supreme Court that LAM did not decide on the lawfulness of the termination and therefore the defendant ought to be estopped from contending otherwise in this appeal.

[129] The gist of the submission of the defendant's counsel on the question of termination is that when the Supreme Court held that LAM had not acted in excess of jurisdiction the Supreme Court was deciding on LAM's action in making all the

decisions that it made on 14 March 1989, that is the decision to waive the requirement for a letter of release and the decision that the defendant had the right to terminate the plaintiff's services. A

[130] From the facts and the narrative of events that I have set out it is clear to me that LAM had all along been consistent in its stand that in deciding that the defendant had the right to terminate the plaintiff's services, it was not deciding that the services were validly terminated, which to it was a separate question and one on which the question of damages depended. It took that stand in the certiorari proceedings in the High Court and it took that stand in the appeal to the Supreme Court. Even the defendant, in the certiorari action, took the stand that LAM did not decide on the validity of the termination. It is clear to me from the facts that LAM's sole concern was that the plaintiff should issue the letter of release to enable the defendant to employ other architects so that the project could proceed. For the letter of release to be issued the plaintiff's services had first to be terminated. LAM's concern was to determine that the plaintiff's services had actually been terminated, and it did so determine after interviewing the parties. The plaintiff still refused to issue the letter of release, arguing that there had been no valid or just termination, whereas LAM's concern was whether there was an actual termination. LAM's decision of 14 March 1989 was essentially a decision to waive the requirement for the letter of release and it was made on its previous finding that the plaintiff's services had been actually terminated. LAM's decision that the defendant had the right to terminate the plaintiff's services was in response to the plaintiff's argument that there had been no valid termination. As I said earlier, what LAM meant by right to terminate which it said was a basic right was that the defendant could not be compelled to continue to engage the plaintiff if it did not want to. It had a right to effect an actual termination. It was a right to be free of a relationship. LAM did not decide that the defendant had justly or validly exercised that right. B C D E F

[131] LAM succeeded in the Supreme Court. The Supreme Court held that LAM had jurisdiction to decide as it did. The essential decision was the waiver decision. Even if the Supreme Court also decided that LAM had jurisdiction to decide that the defendant had the right to terminate the plaintiff's services, which the Court of Appeal said the Supreme Court did, the Supreme Court ought not in the present appeal to be taken to have meant the defendant's right to be in a higher sense than what LAM, the successful party, and even the defendant itself, contended, which was merely a right to effect an actual termination. In deciding as it did, the Court of Appeal had overlooked the sense in which LAM must have spoken of 'right to terminate' and LAM's insistence that it did not decide that the plaintiff's services had been validly terminated. The Supreme Court cannot be taken to have decided that LAM's decision was that the plaintiff's services had been validly terminated and that LAM had jurisdiction to make such a decision. That is the basis on which I find that the Supreme Court's decision in the certiorari action does not constitute res judicata, as being a decision that LAM did make such a decision and had jurisdiction to make it. Although this point is taken up by the plaintiff in its memorandum of appeal as an estoppel point, that is that the defendant, having itself maintained that LAM did not decide that the plaintiff's services had been validly terminated, it should be estopped from arguing otherwise, I go a step further in finding on the facts that LAM G H I

in fact did not so decide and therefore the Supreme Court could not have decided that LAM had so decided and had jurisdiction to so decide.

[132] Deciding the res judicata question with that approach and on that basis, the general question as to LAM's competence need not be answered in order to dispose of this aspect of the appeal. I shall, however, endeavour to answer that question, but after dealing with the next issue on which leave to appeal to this court was granted, namely: 'If the answer to question (a) above is in the negative, was the termination of the applicant herein by the respondent lawful?'. With the approach that I have taken to the res judicata question, the conditional opening words to the question become inapplicable.

[133] Tailoring it according to my understanding, the submission of the plaintiff's counsel on this issue is as follows. The termination of the plaintiff's services cannot be justified on the basis of para 3 of the appointment letter because, as found by the learned trial judge, the project had not been aborted, abandoned or delayed indefinitely. Putting aside para 3, there is no provision in the contract providing for termination. In the absence of such a provision, the plaintiff's services could be terminated validly only on breach by the plaintiff or for just cause, which was not the basis of the termination. The plaintiff's appointment being for the entire project from beginning to end, termination before the purpose of the appointment was achieved was unlawful and constituted breach of contract, for which the defendant is liable in damages. The decisions in the cases of *Thomas* and *Edwin Hill* are relied upon.

[134] The defendant's submission on this question is twofold. Firstly, the defendant's counsel contends that the plaintiff's services had been terminated by virtue of para 7 of the Conditions of Engagement. Secondly, the defendant's counsel contends that the services of the plaintiff had been validly terminated by virtue of para 3 of the appointment letter because the project had been aborted, abandoned or delayed indefinitely. On this latter question I need only say that the attempt by the defendant's counsel to show that such had been the fate of the project is insufficient to overturn the reasoned findings of fact to the contrary made by the learned trial judge as findings that were not warranted by the evidence.

[135] As to the first submission that relies on para 7 of the Conditions of Engagement, it sometimes appears from the written submission of the defendant that the right to terminate that it contends para 7 gives to it is linked to the contention that the project had been aborted, abandoned or delayed indefinitely, so that the submission appears to be that the termination was validly made by virtue of para 7 and it was made because the project had suffered that fate. But from a letter dated 30 January 2007 written by the defendants' solicitors to the court to add a few points of submission, it is clear that the point about para 7 is not linked to para 3 of the appointment letter. It also appears from that letter as if the point about para 7 is the only point relied on by the defendant on the issue of validity of the termination. This is what the letter says:

> But the Respondents' case is that the Conditions of Engagement (Condition 7/Condition 16) which are part of the contract between the Parties by virtue of the Architects Rules 1973, as amended in 1986, provide for termination without breach by either Party.

Such termination without breach is called 'termination without cause' or 'termination at will' and is permitted where the contract contains a provision for such termination. Condition 7/Condition 16 of the Conditions of Engagement is such a provision.

[136] According to the written submission and the aforesaid letter, the defendant's case is that the original Conditions of Engagement, which included rule 7, which was in force at the time when the contract in the appointment letter was formed, were imported into the contract and became part of it, so that the contract was terminable by reasonable notice. As to what notice would be reasonable, the defendant would adopt the period of sixty days in para 16 of the new Conditions of Engagement, which were brought into force on 1 June 1989 retrospectively to 21 August 1986. This is very much the submission that was made in the Court of Appeal and, as I said, is a point of defence not pleaded in the statement of defence and not raised in the High Court. It is a submission that the Conditions of Engagement apply automatically and directly by operation of law to every engagement of an architect.

[137] Since no definite written notice of termination was given in this case, to overcome the problem of notice in this case the defendant argues, as I understand the argument, that sometime before 18 August 1988 the defendant had orally terminated the plaintiff's services. 18 August 1988 was the date of the plaintiffs' letter, already mentioned, forwarding to the defendant the computation of its fees amounting to RM2,031,568. The oral termination is said to constitute sufficient notice for the termination by the letter of 1 November 1988. The contention of oral termination before 18 August 1988 is made as a conclusion to be drawn from a series of correspondence after 18 August 1988, being letters between the parties, mainly from the defendant, dated 23 August, 27 August, 2 September, 5 October and 26 November 1988, some of which I have mentioned before and which I do not intend to set out, or further set out, the contents of because I do not intend to make a finding on this contention of oral termination. The defendant further argues that even if there was no notice of termination, the plaintiff would only be entitled to claim for what it would have earned had it continued to give its services up to the time of expiry of the notice if notice had been given, but the plaintiff would have earned nothing for that period because the project had, as the defendant contends, been at a standstill since 1986 and the defendant had settled the fees for works done up to the date of termination, 1 November 1988.

[138] The plaintiff's counsel has not in this appeal specifically replied to this point. He said, as regards the submission of the defendant generally, that he could not possibly reply to everything. But a reference was made to the plaintiff's submission in the Court of Appeal (although the pages of the Core Bundle that were cited are pages of the plaintiff's submission in the High Court), by which I understand that the plaintiff adopts its submissions in the Court of Appeal. Now in the Court of Appeal the plaintiff's counsel had submitted that the Conditions of Engagement were not applicable unless incorporated by the parties into their contract and that the defendant was not entitled to take up this line of defence because it had not been raised or relied on in the High Court. The latter submission was made in reliance on the Court of Appeal decision in *Manharlal Bhaichand Gathani v Perwira Habib Bank (M) Bhd* [2002] 2 MLJ 139 at p 143F–G, which in turn relied on *Muniandy & Anor*

v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416, a decision of the then Supreme Court. After considering the latter case I think that it is a moot point whether the defendant could in this appeal, or in the Court of Appeal, raise this argument but I do not intend to decide it because, even if the defendant could, I am of opinion that the Conditions of Engagement did not apply to the contract in this case. I agree with the submission that for them to apply they had to be incorporated. Before giving my reasons, I need to say that the defendant's solicitors have pointed out in their written submission in this appeal that in their letter to LAM dated 28 March 1989, the gist of which I have set out, the plaintiff's then solicitors had said that the contract would be properly terminated if para 7 of the original Conditions of Engagement had been observed by giving a 60-day notice as prescribed by the new para 16, which means that to the plaintiff's then solicitors the Conditions of Engagement applied to the contract. But this is a point of law, and I think the plaintiff is not precluded from taking in court a position as to a point of law that is contrary to a position that, by its solicitors, it took in negotiations before coming to court.

[139] The Conditions of Engagement are backed by r 28 of the Rules. At the time when the contract was entered into, r 28 that was in force was the original r 28 that I have set out. For convenience I will set it out again:

> 28. Except with the prior agreement of the Board given for special reasons, an Architect … shall only enter into an engagement for his professional services upon the conditions in the Fourth Schedule.

[140] By the manner of its wording, the rule imposes a duty on an architect to enter into an engagement only upon the conditions in the Conditions of Engagement. If he fails to do so and enters into an engagement otherwise than upon the conditions in the Conditions of Engagement, he acts in breach of the rule and is liable to suffer the consequences of breaching the rule, but the engagement remains an engagement that is not in accordance with the conditions in the Conditions of Engagement. The Conditions of Engagement, therefore, will apply to an engagement of an architect only through observance by the architect of rule 28 by incorporating them in the contract. If the architect does not observe r 28, the Conditions of Engagement are not incorporated into the contract. Rule 28 is not worded as a provision that makes the Conditions of Engagement directly applicable to every engagement of an architect.

[141] It is interesting to note that the new r 28(1) additionally requires an architect to enter into an agreement for his professional services in accordance with the Memorandum of Agreement in the Fifth Schedule, which was introduced by the 1986 amendment. Paragraph 2 of the agreements in the Memorandum of Agreement says that the parties agree that 'This Memorandum of Agreement, the Conditions of Engagement and the Architects (Scale of Minimum fees) Rules 1986 shall together constitute the Agreement between the client and the Architect'. That is the agreement that incorporates the Conditions of Engagement. If an architect complies with r 28(1) and enters into an agreement in the form of the Memorandum of Agreement, the Conditions of Engagement are incorporated into the agreement. If he does not

comply with r 28(1) and enters into an agreement in some other form, the Conditions of Engagement will not apply unless they are expressly incorporated into the agreement.

[142] I would in passing observe that it seems to me debatable whether, even if the Conditions of Engagement applied to a contract and a termination was done in accordance with the old para 7 or the new para h 16, it would necessarily preclude an action for damages for wrongful termination in breach of contract. I say this upon looking at the new para s 16, 17 and 18. Paragraph 16 provides for termination by giving a notice of sixty days or an agreed shorter period. Paragraph 17 imposes a duty on the architect to submit his accounts to the client for the balance of fees due and other reimbursable charges within thirty days from the date of expiry of the notice of termination. Paragraph 18 imposes an obligation on the architect to issue a letter of release to the client after the client has paid the architect's balance of fees and reimbursable charges. But para 18 applies only in the event that the agreement 'is terminated for a reason not due to the fault of either party'. This could mean that a termination with proper notice under paragraph 16 may be both a termination for a reason not due to the fault of either party and for a reason due to the fault of either party. In the latter case the obligation to issue a letter of release does not arise under paragraph 18 and, where the alleged fault is that of the architect, and the architect denies the fault, it may be possible for the architect to advance a case of wrongful termination through no fault of his, so that although the termination is in accordance with para 16 it would not prevent disputes about the justice of termination from being taken up. If so, cl 16 may be intended to provide merely the ritual for an effective termination, an effective breaking of ties, but is not intended to say that the termination is a just termination that precludes the architect from bringing a claim for damages for wrongful termination. But these are only casual and tentative remarks made by way of a questioning. The question has not been examined in this appeal and I need not decide it because I have found that the Conditions of Engagement do not apply to the contract in this case.

[143] My answer to the second question is, therefore, that the termination of the plaintiff's services in this case was unlawful.

[144] I will now attempt to answer the question whether LAM is 'competent to decide the lawfulness or otherwise of the termination of an architect by his client.' which I said is a general question, and that is because the question relates to 'an architect' and 'his client', and not specifically the plaintiff and the defendant.

[145] LAM is a creature of statute, the Architects Act 1967. What it may or may not do is to be found only in the Act and the rules made under section 35. There is no provision that gives LAM the competency to decide the lawfulness or otherwise of the termination of the services or engagement of an architect by his client, which is a question that arises only in a dispute between the client and an architect about their contractual relationship. The disputes that LAM is empowered by para (e) of s 4 of the Act to hear and determine are disputes relating to professional conduct or ethics of architects. Such a dispute would be one where, for example, a client or another architect complains that the architect has breached the Code of Professional

Conduct or, maybe, r 28 of the Rules for entering into an agreement for his professional services not according to the Conditions of Engagement. No dispute can arise under the Code of Professional Conduct, for LAM to hear and determine, about the lawfulness or otherwise of the termination of an architect's services or engagement because the Code of Professional Conduct does not deal with such matters.

[146] A dispute about the lawfulness of the termination of an architect's services or engagement may very well arise under the Conditions of Engagement. An architect might, for example, claim that his engagement has not been validly terminated because the appropriate notice has not been given, and therefore he is not bound under para 18 to issue a letter of release. Since, in my judgment, the Conditions of Engagement will apply only if they have been incorporated into the contract, such a dispute will only arise where the Conditions of Engagement have been so incorporated and the dispute then becomes a contractual dispute and not a dispute relating to professional conduct or ethics which s 4(e) empowers LAM to hear and determine. Even if the dispute were brought to arbitration under paragraph 21 of the Conditions of Engagement, the dispute would be decided by the appointed arbitrator and not by LAM.

[147] There is GC 6/88 to consider. It lays down guidelines about letters of release. Apparently the guidelines were intended for the implementation of Code 3(8) of the Code of Professional Conduct. There is no indication that they were drawn up with para 18 of the Conditions of Engagement in mind. Their legal status has not been examined in this appeal, and what I am going to say is on the assumption that they are valid. GC 6/88 says that failure to comply with the guidelines shall be deemed to be an infringement of the Code of Professional Conduct. A dispute about a breach of the guidelines would therefore be within the competence of LAM to hear and decide under para (e) of s 4 of the Act. But it is difficult to see from the guidelines that any breach of them would involve a dispute about whether the appointment of an architect has been validly terminated. Apart from a dispute as to breach, if the guidelines were applied strictly, the only instance in which LAM may be involved in deciding a dispute would be under para 1.4 d, but the dispute would be about fees and not about validity of termination. The present case is an exceptional case where LAM felt it necessary in the circumstances to act under para 1.4 e to waive the requirement for the letter of release even though the steps laid down in para 1.4 leading up to the exercise of the discretion to waive had not been passed, and it did so on the basis of a finding that there had been an actual termination, as opposed to a valid termination, of the plaintiff's services. The Supreme Court held that LAM had jurisdiction to exercise the discretion. Even if a similar case were to arise again, the most that LAM could do were it necessary to decide about termination would be to decide, as LAM itself claimed it did in this case, whether there had been a de facto or actual termination and not whether there had been a valid termination.

[148] My answer to the first question is therefore that LAM is not competent to decide the lawfulness or otherwise of the termination of an architect by his client. Only the Act can give it that competence and the Act does not give it. It may be appropriate to say something now about the cases of *Thomas* and *Edwin Hill*. In *Thomas*, the facts were entirely different from those in this case. For one thing, the

appointment of the architect was subject to the special term that his fees would be in accordance with the scale of professional charges of the Royal Institute of British Architects, which provided that, in cases where the project was abandoned, the fees depended upon the stage of the work that had been completed. It is not necessary to state the actual facts that gave rise to the dispute and the manner in which the Court of Appeal decided the dispute, because what is important for the present case is the statement of the position of a hypothetical case that Slesser LJ made at the beginning of his judgment. I quote the statement — which begins with the words 'In order to arrive at' — including the very general summary of the facts preceding the statement:

> On 28 June 1933, the defendant council, by resolution under seal, appointed the plaintiff as 'architect in connection with the revised scheme for the erection of the new town hall' and agreed to the payment to him of fees in accordance with the scale of professional charges of the Royal Institute of British Architects. The architect thereon, with additions relating to former work, here not material, including the charges therefor, accepted the appointment and proceeded with the work, until, on 23 July 1935, the defendant council decided to abandon the scheme and terminate the agreement with him. In order to arrive at a true conclusion as to the legal result of the council's action in this matter, I think it helpful first to consider what would have been the agreement between the parties if the appointment had been simpliciter to act as architect for the erection of the new town hall, without any provision as to scale of charges, and if the council had then, before the work was completed, without cause other than their mere volition, terminated the agreement. In such case, I entertain no doubt that the architect would have been entitled to reasonable remuneration for the work which he had already done, and also to damages for the loss of remuneration which he had been prevented from earning until the work was finished. … Although the contract in this assumed form would contain no express term to this effect, I think that it would be implied that the council, having employed the plaintiff to build their town hall, agreed with him that they would not prevent him from doing the work, and so prevent him from earning his remuneration.

[149] This was echoed by MacKinnon LJ in the following words:

> If, when the plaintiff was appointed architect for the new town hall in June 1933, no special terms as to his remuneration had been agreed, the defendants would have been liable to pay him reasonable reward. Upon this abandonment of the scheme, and dismissal of the architect, in July 1935, they would have been liable to pay him reasonable remuneration for the work he had done already, together with damages for preventing him from earning payment for the further work in completion of his appointed task.

[150] Those passages were applied in *Edwin Hill*, which Hutchison J said was actually such a case as the assumed case described in those passages. This is what Hutchison J said at p 68:

> In cases, unlike the present, where the RIBA or RICS terms of engagement have been incorporated in the contract, there exists a right to terminate on making the appropriate payment having regard to the stage the work has reached. However, where there is a simple agreement for the employment of an architect or surveyor for a particular project and nothing is said as to termination, I consider that the two passages I have cited from *Thomas v Hammersmith Borough Council* correctly state the contractual obligations of the parties and I propose to rely upon them in determining this case.

The question remains whether the present is such a case as Slesser and MacKinnon LJJ were describing. A careful consideration of the evidence and the relevant documents, both of which I have already summarised, leave me in no doubt that it is.

[151] Bearing in mind that the provisions in the contract in this case, which is the appointment letter, regarding the rate of fees and the mode of payment are not what the RIBA scale of charges mentioned in Thomas are, and laying aside para 3 of the appointment letter, which is inapplicable on the facts, and the Conditions of Engagement, which have not been incorporated into the contract, the contract in this case would be similar to the hypothetical contract in Thomas and the actual contract as found in *Edwin Hill*. The principle set out in the two cases is clearly applicable in this case.

[152] In this appeal the defendant has not argued against the correctness of the sum of RM7,705,382 awarded by the High Court as damages for breach of contract.

[153] For the reasons that I have given, I would allow the appeal, with costs here and below, and set aside the orders of the Court of Appeal and restore the orders of the High Court.

Appeal allowed.

Reported by Brendan Navin Siva